No. 152.

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Filed Feb. 25, 1901.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

THE CITY OF DETROIT et al.
Appellant,
vs.
DETROIT CITIZENS' STREET RAILWAY CO.,
Appellee.

BRIEF FOR APPELLEE ON MOTION OF APPELLANT TO ADVANCE CASE.

M. BRENNAN and
JOHN C. DONNELLY,
Counsel of Appellee.

Supreme Court of the United States

THE CITY OF DETROIT,
WILLIAM C. MAYBURY, Mayor.
CHARLES FLOWERS, Corporation Counsel.
Appellants.

vs.

THE DETROIT CITIZENS' STREET RAILWAY COMPANY.
Appellee.

Appeal from United States Circuit Court, Eastern District of Michigan. In Equity.

Docket No. 412. October Term. 1900.

MEMORANDUM BRIEF FOR APPELLEE ON MOTION TO ADVANCE.

This case involves the question of the power of the Common Council of the City of Detroit, by a municipal ordinance adopted by that body, to reduce the rates of fare for the carriage of passengers on the street railway lines in the City of Detroit, from the rate fixed by the original grants and contracts at various times entered into between the city and the different companies, and to so reduce the same against the protest, and without the consent of the companies. The original grants and contracts were made as follows:

1. That with the Detroit City Railway, on November 24th, 1862, which provides as follows: "The rate of fare for any distance shall not exceed 5 cents on any one car, or on any one route named in this ordinance except as cars or carriages shall be chartered for specific purposes, provided that cars so chartered shall not be considered regular cars within the meaning of the preceding section." This grant was subsequently extended so that the same was in all respects in full force in August, 1899, when the attempt was made to change the rate of fare.

2. With the Grand River Street Railway of May 1st, 1868, which provides as follows: "The rate of fare for any distance shall not exceed 5 cents on any one car, or on any one route

named in this ordinance." An additional grant to that company on June 27th, 1885, covering the original route, and one additional one provided, "The rate of fare over such route shall be 5 cents," and a subsequent grant over same route, to the same company, for another route, as a part of its system, provides, "Said company is required to file a stipulation or agreement in writing, by the terms of which, it may carry on its cars, passengers, from the westerly terminus, on its line on Myrtle street and Grand River avenue, to the northerly terminus on its line, on Crawford street, on any point on any of its said lines, and any point on Congress street, east, or to the terminus thereof, for a single fare of 5 cents, for any continuous trip, and further fixed the fare for a continuous trip to any other point on its line "for a single fare of 5 cents for one continuous trip."

3. By ordinance of June 13th, 1873, with the Detroit & Grand Trunk Junction Street Railway Company, which provides, "Passengers conveyed upon such railway, in said city, shall be charged no more than 5 cents for any distance."

4. Ordinance of June 16th, 1875, authorized the Central Market, Cass Avenue & Third Street to construct a railway on certain routes and provide: "Passengers conveyed on said railway, in said city, shall be charged no more than 5 cents for any distance."

The Detroit & Elmwood Railway Company, in 1865, was given a grant in which it was authorized to charge a rate of fare not exceeding 5 cents, being almost literally like those already quoted.

All of the provisions above referred to, and others of like import, contained in grants of subsidiary lines together with certain provisions of the statutory law of Michigan, touching the question, are quoted with great particularity and fullness in the opinion of the learned District Judge who decided the case below, a printed copy of which opinion is filed herewith, for the information of this Court. The grants containing the provisions referred to were all in force and effect on the 16th of August, 1899, when the Common Council adopted ordinances as to all of the lines and grants in question, which required the companies to sell tickets at the rate of 8 for 25 cents, and to give universal transfers thereon, thus reducing the rate of fare in two particulars, viz.: passengers were entitled to ride any distance at the rate of 8 for 25 cents, instead of 5 cents as fixed by the original agreements, and further requiring the companies to transfer a passenger demanding such accommodation, to any other line or ruote in the city, upon which transfer he would be entitled to a free ride, or to a ride over both routes, for a single fare at the rate

of 8 tickets for twenty-five cents, which was not required of the different companies under the original grants. The original grants were all accepted by the various companies, and under the well settled rule, established contractual relations between the city and the company.

The city claims the power to reduce the fares by virtue of its charter, adopted in 1893 after grants were made, and also by the terms of the street and tram railway acts under which the original grants were made, claiming that by virtue thereof the city had the authority to regulate from time to time the rates of fare without the consent of the companies. These claims were denied by the company, which claimed that the ordinance of Aug. 16, 1899, reducing rates of fare and requiring free transfers operated to impair the contracts contained in the original grants. These various questions are set out and discussed with great fullness in the opinion of the learned District Judge. While we are impressed with the importance of the case, both in its practical effect, and in the principle of legislative authority and constitutional law involved, we are not satisfied that the case is one coming within the rule upon the question of advancing cases for argument on the docket. The case is of undoubted importance to the street railway companies of the country, because if the Legislature of Michigan has, by express or implied authority, conferred upon the municipality the extraordinary power claimed by it in this case, and such power is not restricted by constitutional limitations, the street railways of the country are in a most precarious and hazardous condition, and the immense capital invested therein is more or less menaced. Certainly such a condition is one wholly at variance with what has been the heretofore accepted view of the binding character of this class of contracts. It is to be noted that many of the grants sought to be effected, are of many years' standing, and according to the claim of the city, some of the most important of them expire by lapse of time, within a few years. There is no sudden crisis or emergency, calling for prompt action. The conditions which existed on August 16th, 1899, had existed for nearly 40 years.

It is respectfully submitted that a case is not made out for the application of the rule providing for the advancement of the cause on the docket, but if the Court should think otherwise, it is respectfully suggested that the argument be put for as late a day in the term as the business of the Court will permit, as considerable time is necessary to prepare for the argument.

M. BRENNAN and
JOHN C. DONNELLY,
Counsel for Appellee.

DETROIT:
Record Printing Co., Free Press Bldg., 11 and 13 Lafayette Ave.
1901.

The Circuit Court of the United States,

FOR THE EASTERN DISTRICT OF MICHIGAN,

SOUTHERN DIVISION.

In Equity.

THE DETROIT CITIZENS STREET RAILWAY COMPANY,

vs.

THE CITY OF DETROIT, et al.

OPINION.

BRENNAN, DONNELLY & VAN DE MARK,
Solicitors for Complainant.

H. M. DUFFIELD and
FRED A. BAKER,
Of Counsel.

DETROIT:
Record Printing Co., Free Press Bldg., 11 and 13 Lafayette Ave.
1900.

The Circuit Court of the United States,

FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION.

In Equity.

THE DETROIT CITIZENS STREET RAILWAY COMPANY.

vs.

THE CITY OF DETROIT, et al.

Messrs. Brennan, Donnelly & Van De Mark, John C. Donnelly, Henry M. Duffield and Fred A. Baker, for complainant.

Charles Flowers, T. E. Tarsney and Jasper C. Gates, for defendants.

Swan, J.:

The complainant in this cause is a street railway corporation, organized in September, 1891, under an Act of the Legislature of Michigan approved March 5, 1867, entitled: "An Act to provide for the formation of street railway companies" (Chapt. 95, Howell's Ann. Stats. of Mich.), Sections 13, 14 and 20 of the act provide as follows:

> "Sec. 13. Any street railway corporation organized under the provisions of this act may, with the consent of the corporate authorities of any city or village given in and by an ordinance or ordinances duly enacted for that purpose, and under such rules, regulations and conditions as in and by such ordinance or ordinances shall be prescribed, construct,

use, maintain and own a street railway for the transportation of passengers in and upon the lines of such streets and ways in said city or village as shall be designated and granted from time to time for that purpose in the ordinance or ordinances granting such consent, but no such railway company shall construct any railway in the streets of any city or village until the company shall have accepted in writing the terms and conditions upon which they are permitted to use said streets; and any such company may extend, construct, use and maintain their road in and along the streets or highways of any township adjacent to said city or village upon such terms and conditions as may be agreed upon by the company and the township board of the township, which agreement and the acceptance by the company of the terms thereof, shall be recorded by the township clerk in the records of his township."

"Sec. 14. After any such village or township shall have consented as in this act provided, to the construction and maintenance of any street railways therein or granted any rights and privileges to any such company and such consent and grant have been accepted by the company, such township, city or village shall not revoke such consent nor deprive the company of the rights and privileges so conferred."

"Sec. 20. The rates of toll or fare which any street railway company may charge for the transportation of persons or passengers over their road shall be established by agreement between such companies and the co-operation of the authorities of the city, or village where the road is located and shall not be increased without the consent of such authorities."

The bill charges the violation by the defendant of the rights acquired by complainant and its predecessors and assignors under the Acts of 1855 and 1867. A brief recital of the rights and privileges accorded to these several lines of street railway, is necessary.

November 24, 1862, the City of Detroit entered into a contract with Eben N. Wilcox and his associates, successors and assigns, whereby said Wilcox and his associates organized into a corporation under the Train Railway Law (Chap. 94, Howell's Ann. Stats. of Michigan), and were authorized and empowered to construct, equip and maintain and use single or double track railways with all necessary and convenient tracks, etc., in, along and through certain streets, avenues and public places in the City of Detroit and to operate thereon, railway cars and carriages. This contract was adopted by the Common Council in the form of an ordinance, which was accepted by the grantees therein named, who were duly organized into a corporation by the name of the "Detroit City Railway." The grantee duly accepted said ordinance, performed all the terms and conditions thereof and constructed and put in operation the railway thereby authorized, and has since maintained and operated thereunder, lines of street railway upon Jefferson, Woodward, Gratiot and Michigan avenues in the City of Detroit. Amendatory and supplemental ordinances granted to said Detroit City Railway, like rights and privileges in other streets and avenues upon which lines of railway were constructed and have ever since been operated under the terms of said original and supplementary ordinances. These latter lines were built and operated on Brush, Trumbull, Chene, East Fort and other streets in the city. The ordinance of November 24, 1862, provided in Section 23 thereof, as follows:

> "The rate of fare for any distance, shall not exceed five cents on any one car or on any one route named in this ordinance except where cars or carriages shall be chartered for specific purposes, provided that cars so chartered shall not be considered regular cars within the meaning of the preceding section."

By Section 5 of said ordinance it was provided that:

> "The routes of all said railways shall commence in the Woodward avenue road at the Campus Martius, from thence running on their several courses to the outer limits of the city; Provided, that in collecting fares those portions between Atwater through Brush or Beaubien streets, and through Woodward avenue to Jefferson avenue and between Brush and Beaubien or Third streets on Jefferson avenue and Woodbridge streets, shall be respectively deemed to belong to either of the above routes, any portion of which is then being traveled continuously by any one passenger at the same time, shall pay only one fare."

That is that the lines of each of said avenues, to-wit: Jefferson, Gratiot, Michigan and Woodward avenues should each be considered a separate route. The lines on Brush street and Trumbull avenue were maintained and operated each as a separate route, and it is the claim of complainant that under said ordinance, the Detroit City Railway Company and complainant, as its grantee and successor, became entitled to exact and collect from each passenger taking passage on any one of the routes named, the full fare of five cents for a single ride in any direction from any portion of the road on which he took passage, and such passenger was not entitled to have or receive from the railway company in consideration of his payment of said fare of five cents, any transfer ticket or other contract or have the right to a free ride over any one of the other routes of the company or to a ride over more than a portion of any one of said routes or to be transferred to or carried over any portion of any other route without the payment of additional fare. By an ordinance of the City of Detroit, approved January 3, 1889, and duly accepted by the Detroit City Railway Company, authority was given to said company to construct and operate lines of street railway

in, along and through Fort street east, Mack street, Chene street and Cass avenue and to connect its lines on Michigan avenue with the Monroe and Gratiot avenue lines. All of these several lines, excepting that on Cass avenue, have been constructed and are now owned and operated by complainant under ordinances of the City of Detroit accepted in writing by the complainant and its predecessors.

By Section 4 of said ordinance of January 3, 1889, it was enacted that:

> "Sec. 4. The above mentioned additional lines shall be operated in connection with and as part of the present system of the Detroit City Railway, but the permission and authority hereby given shall be inoperative and void unless the said Detroit Railway shall file a written acceptance thereof within thirty days from the date of the pasage of this ordinance in which the said company shall agree to do and perform the following with reference thereto:
>
> (a) It shall carry passengers over its Cass avenue and Third street, Trumbull avenue and Michigan avenue and Congress and Baker street lines to any point on the proposed line on Fort street east or the easterly terminus thereof for a single fare of five cents for one continuous trip, and from the easterly terminus of the proposed line on Fort street east or from any point thereon to any point on Congress and Baker streets, Michigan avenue, Trumbull avenue and Cass avenue and other street lines for a single fare of five cents for one continuous trip."

Other lines of railway had been constructed from time to time and put in operation by complainant's predecessors in ownership under the authority of the Common Council, all of which with those above named have been acquired and are operated by the complainant. The ordinances which authorized the several lines have been amended by the joint action and consent of the Common Council and the railway companies apparently in consideration of mutual concessions and undertakins of the contracting par-

ties. The principal changes effected by these amendments were the privilege of transfer over various lines to a passenger paying a single fare of five cents and the company's consent to sell eight workingmen's tickets, so-called, good during specified hours, for twenty-five cents. Aside from these modifications which were prices paid by the railway companies for extensions and changes in their lines and extensions of the term of their easements in the streets of the city and other rights and privileges, the rate of fare established by the agreement of the city and the companies was and has been from the first uniformly five cents, which was prescribed by the ordinances and accepted by the grantees as appears in the municipal legislature declaring the terms and conditions on which the city's consent to the use of its streets was granted and accepted by the grantees. These several ordinances contain differences of expression, but none of substance or meaning.

The first ordinance, that of November 24, 1862, by Section 8, provides:

> "The rate of fare for any distance shall not exceed five cents in any one car or on any one route named in this ordinance. * * *"

That of January 31, 1865, to the Fort Street & Elmwood Avenue Railway, the name of which is now the Fort Wayne & Belle Isle Railway Company, by Section 8 provides:

> "The rate of fare for any distance shall not exceed five cents in any one car on said route, etc. * * *"

The ordinance of January 3, 1889, authorizing the Detroit City Railway to construct and operate the street railways designated as the East Fort street line, Chene street line, Cass avenue extension and Mack street line, and to lay double tracks on Jefferson and Gratiot avenues, by Section 4, provides:

> "That the above mentioned lines shall be operated in connection with and as part of the present system of the Detroit City Railway. * * *"

And further:

> "Shall carry passengers from its Cass avenue, Third street, Trumbull avenue, Michigan avenue and Congress and Baker street lines to any point on the proposed line on Fort street east or to the easterly terminus thereof, for a single fare of five cents for one continuous trip,"

and a like fare is prescribed for travel on other of the lines authorized.

The ordinance of May 1, 1868, granting the right to the Grand River Street Railway Company, to construct and operate its street railway in specified streets of the city, by Section 6, provided:

> "The rate of fare for any distance shall not exceed five cents in any one car or on any one route named in this ordinance, except, etc. * * *"

June 27, 1885, the Common Council, by ordinance of that date, authorized the Grand River Street Railway Company to construct and operate a railway track, etc., on Myrtle street, which ordinance, by Section 2, defined the limits of the railway, and declared:

> "The rate of fare over such route shall be five cents."

January 3, 1889, the Common Council passed an ordinance authorizing the Grand River Street Railway Company to construct the Crawford street and East Congress street lines, and by Section 3 thereof, the Grand River Street Railway Company was required:

> "To file a stipulation or agreement in writing by the terms of which it shall agree to carry passengers from the westerly terminus of its line on Myrtle street and Grand River avenue, to the northerly ter-

> minus of its line on Crawford street on any point on any of its said lines to any point on its line on Congress street east, or to the terminus thereof, for a single fare of five cents for one continuous trip."

and also fixed the fare for a continuous trip to any other point on its lines:

> "For a single fare of five cents for one continuous trip."

This ordinance also required the grantee to issue and sell tickets at the rate of eight tickets for twenty-five cents to be good for transportation over the entire route of said company or any portion thereof traveled continuously either way, between specified hours of the morning and afternoon.

The ordinance approved October 14, 1892, authorizing the Detroit Citizens' Street Railway Company to construct and operate additional tracks on Griswold, Woodward and Atwater streets as part of the system of railways authorized by the ordinance approved May 1, 1868, practically fixed the same rate of fare by requiring these railways to be operated as part of the Grand River avenue system.

The ordinance of June 13, 1873, empowered the Detroit & Grand Trunk Junction Street Railway Company to construct and operate its railway over Mt. Elliott avenue, through Congress and other streets to the westerly limits of the city, and by Section 12 enacted that:

> "Passengers conveyed upon said railway in said city, shall be charged no more than five cents for any distance."

The rights granted under this last ordinance were, prior to July 14, 1879, assigned to the Congress & Baker Street Railway Companies.

The ordinance of June 16, 1875, authorized the Central Market, Cass Avenue & Third Street Railway to construct

and operate its railway from Jefferson avenue through specified streets to the Holden road, and also upon other streets in the city. Section 12 provided:

> "Passengers conveyed upon said railway in said city be charged no more than five cents for any distance."

The grantee assigned its rights and property to the Cass Avenue Railway Company prior to November 14, 1879, and the latter company, June 22, 1882, transferred the same to the Detroit City Railway Company.

The ordinance of April 17, 1886, authorized the construction and operation of the Dix Avenue Railway and by Section 6 provided:

> "The rate of fare for a single trip, shall not exceed five cents for any distance within the city limits."

The Highland Park Railway was authorized by the ordinance of July 13, 1886, to construct and operate a track along Woodward avenue between the railroad crossing and the northerly city limits, and by Section 5, it was provided:

> "The rate of fare for a single trip, shall not exceed five cents for any distance within the city limits."

By the ordinance of July 24, 1886, the Fort Wayne & Elmwood Railway Company was authorized to construct and operate its railway along Fort street from its intersection with Clark avenue to the intersection of Fort street and the westerly limits. Section 2 of the ordinance enacted:

> "The rate of fare for any distance on said Fort Wayne & Elmwood Railway, including the extension authorized by this ordinance, shall not exceed five cents in any one car, except, etc. * * *"

December 22, 1886, the Common Council passed an ordinance granting the same company the right to construct and operate its railway on Elmwood avenue and East Lafayette street to the Boulevard, declaring the original lines and the extension granted, one railway, and that:

> "Each passenger traveling the same continuously either way, over the whole or any portion thereof, shall pay only one fare, the amount of which shall be five cents."

The ordinance of January 3, 1889, authorized the Fort Wayne & Elmwood Street Railway Company to construct and operate its railway upon certain specified streets, additional to its original grant, and declared that the railways thereby authorized, should be deemed one railway, and:

> "Each passenger traveling the same continuously either way, over the whole or any portion thereof, shall pay only one fare, the amount of which shall not exceed five cents."

A proviso required the company to issue and sell tickets at the rate of eight for twenty-five cents, to be good for transportation over the entire route of said company during specified hours.

The Detroit Railway was authorized by the ordinance approved December 4, 1894, to construct and operate a street railway upon specified streets and avenues of the city, the grant covering several routes. Section 10 of the ordinance provides:

> "The rate of fare for a single ride for a continuous trip any distance in one direction over any one of the routes hereinbefore described, shall be five cents,"

for which the passenger is entitled to such ride and to a ticket or transfer check good for a ride over any other line

or road operated by said grantees, their associates and assigns, if presented within a certain time.

It also required the grantee to issue and sell packages of eight tickets for twenty-five cents, which tickets would be accepted for fare between certain hours, and entitled the passenger to a transfer for a continuous ride over any other line or route of said grantees.

All these ordinances were accepted in writing by the respective grantees. Other ordinances affecting the street railways were passed by the Council between the time of the grants conferred by the city in 1862 and 1865, and the passage of the ordinances of August 17, 1899, but they contain nothing germane to the question involved in this suit, with three exceptions. On the 14th of November, 1879, the Common Council passed an ordinance making certain requirements from the Detroit City Railway Company, which had become the owner of all the street railways then in operation, excepting the Fort Wayne & Elmwood Railway Company and its extensions and the Grand River Railway Company and its lines. This ordinance was the culmination of many differences which had arisen between the city and the Detroit City Railway Company, notably controversies concerning the taxes payable by the railway companies to the city, and was an adjustment of the relations of the city and the company as to the controverted matters. It exacted of the company the extension of certain of its lines, and that its cars on all lines should be operated as the public convenience might require and the Common Council order. In consideration of the acceptance of this ordinance by the Detroit City Railway Company as a compromise of the differences existing between it and the city, and in view of the expenditure required of the grantee to comply with the demands of the City Council, by Section 5 of the ordinance it was enacted:

> "The powers and privileges conferred and obligations imposed on the Detroit City Railway Company by the ordinance passed November 24, 1862, and the amendments thereto, are hereby extended and limited to thirty (30) years from this date."

By Section 6, the ordinance was made to take immediate effect when written acceptance of the terms thereof were filed in the office of the City Clerk of Detroit, by the Detroit City Railway Company, the Detroit & Grand Trunk Junction Street Railway Company and the Central Market, Cass Avenue & Third Street Railway Company or their successors, which two latter corporations had assigned their rights and property to the Detroit City Railway, and:

> "From that date, all ordinances or parts of ordinances in conflict with the provisions hereof, shall stand repealed, and all ordinances and parts of ordinances in any conflict herewith, shall be affirmed and continued in force."

By Section 7, the "right to amend or repeal this ordinance in case of its violation by said company or companies" is expressly reserved. A like ordinance was passed June 30, 1880, giving to the Fort Wayne & Elmwood Street Railway Company (formerly known as the Fort Street & Elmwood Avenue Railway) an extension of the powers and privileges conferred upon it under its original corporate name by the ordinance of January 31, 1865, and the amendments thereof, for thirty years. This ordinance is apparently identical, *mutatis mutandis* with that applicable to the Detroit City Railway above quoted. These ordinances were accepted in writing by the grantees. Both the city and the railway companies assumed that the easement or franchise in the streets by the ordinance of 1862 and 1865 were limited to thirty years. By a similar ordinance approved December 3, 1885:

"The powers and privileges conferred and obligations imposed on the Grand River Street Railway Company by the ordinance passed May 31, 1868, and the amendments thereto, are hereby extended and limited to thirty years from and after the first day of January, A. D. 1886. * * *"

All of the railways named in the bill except the Grand River Railway and the Fort Wayne & Belle Isle Railway Company were acquired by the Detroit City Railway Company, which in September, 1891, sold and conveyed the same, with the rights, easements or franchises belonging thereto, to complainant, which also acquired October 1, 1891, all of the rights and property of the Grand River Railway Company (formerly known as the Grand River Street Railway), and subsequently became the lessee of the rights, privileges and property of the Fort Wayne & Belle Isle Railway Company. Since its acquisition of said several lines as narrated, complainant has lawfully operated and still is so operating the same.

The Detroit City Railway, the Grand River Street Railway and the Fort Street & Elmwood Avenue Railway, as it was first called, were originally incorporated under the Train Railway Act of 1855, Chap. 94 How. Ann. Stats., but these companies and all others involved in this case have since been incorporated under the Street Railway Act of 1867, mentioned hereinafter. The Act of 1855 up to 1861, contained but thirty-two sections and contemplated only the formation of corporations for the construction and operation of train railways upon and over which any person or company might carry freight in their own vehicles paying tolls for the use of the track. It was amended February 2, 1861, by adding Sections 33 and 34 thereto, which read:

"Sec. 33. It shall be competent for parties to organize companies under this act to construct and

operate street railways in and through the streets of any town or city in this State."

"Sec. 34. All companies or corporations formed for such purposes shall have the exclusive right to use and operate any street railways constructed, owned or held by them; provided, that no such company or corporation shall be authorized to construct a railway under this act through the streets of any town or city without the consent of the municipal authorities of said town or city and under such regulations and upon such terms and conditions as said authorities may from time to time prescribe."

March 27, 1867, the act was again amended by adding to Sec. 34, the following, as part of that section, namely:

"Provided further, that after such consent shall have been given and accepted by the company or corporation to which the same is granted, such authorities shall make no regulations or conditons whereby the rights or franchises here granted shall be destroyed or unreasonably impaired or such company or corporation be deprived of the right of constructing, maintaining and operating such railway in the street in said consent or grant named pursuant to the terms thereof."

Section 36, after prescribing what shall be a sufficient designation of the route or routes stated in the Articles of Association of the company, provides as follows:

"It shall be lawful to build, maintain or extend the railway of such company according to the terms and conditions of such grant or grants. * * *"

Sections 41 and 42 were enacted April 12th, 1871. The latter provides that:

"All the provisions of this act as amended, shall be applicable to all corporations now organized under this act as though specifically named."

March 5, 1867, the Street Railway Act of 1867, so-called, was passed. It is entitled, "An Act to provide for the

formation of Street Railway Companies," and prescribes a complete scheme for the organization of such companies, which would seem to have been designed to displace, if not repeal former legislation to that end. Sections 13, 14, 15, 19, 20, 29 and 30 of this act are as follows:

"Sec. 13. Any street railway corporation organized under the provisions of this act, may, with the consent of the corporate authorities of any city or village given in and by an ordinance or ordinances duly enacted for that purpose and under such rules, regulations and conditions as in and by such ordinance or ordinances shall be prescribed, construct, use, maintain and own a street railway for the transportation of passengers in and upon the lines of such streets and ways in said city or village as shall be designated and granted from time to time for that purpose in the ordinance or ordinances granting such consent; but no such railway company shall construct any railway in the streets of any city or village until the company shall have accepted in writing, the terms and conditions upon which they are permitted to use said streets. * * *"

"Sec. 14. After any city, village or township shall have consented, as in this act provided, to the construction and maintenance of any street railways therein or granted any rights and privileges to any such company, and such consent and grant have been accepted by the company, such township, city or village shall not revoke such consent nor deprive the company of the rights and privileges so conferred."

"Sec. 19. The common council or other corporate authorities of the city or village in which any street railway shall be located, may from time to time by ordinance or otherwise, establish and prescribe such rules and regulations in regard to said railway as may be required for the grading, paving and repairing of the streets, and the construction of sewers, drains, reservoirs and crossings and the laying of gas and other pipes upon, in and along the

streets traversed by such road and to prevent obstructions thereon."

"Sec. 20. The rates of toll or fare which any street railway company may charge for the transportation of persons or passengers over their road, shall be established by agreement between such company and the corporate authorities of the city or village where the road is located and shall not be increased without consent of such authorities."

"Sec. 29. All companies and corporations heretofore organized in this State for the purpose of building and operating street railways under the statutes then in force, shall have the same powers, rights, protection and privileges and shall be subject to all the liabilities as are hereby provided for companies and corporations organized under the provisions of this act."

"Sec. 30. All companies and corporations hereafter formed for the purpose of constructing, owning or using any street railway for the transportation of persons or passengers in any city or village shall be organized under the provisions of this act and shall be subject to the provisions of Chapter Seventy-three (73) of the Compiled Laws of this State, and to all other general laws of this State relating to corporations so far as the same may be applicable to corporations formed under this act, and the Legislature may alter, amend or repeal this act at any time."

Section 15 authorizes any street railway company to:

"Purchase and acquire either at public or private sale or to hire any street railway company in any city, village or township, owned by any other corporation together with the real and personal estate belonging thereto and the rights, privileges and franchises thereof and to use, maintain and complete such road and use and enjoy the rights, privileges and franchises of such company and upon the same terms as the company whose roads and franchises were so acquired, might have been, etc."

It will be noted that when the original grant to the Detroit City Railway was re-enacted and extended November 14, 1879, and that to the Fort Wayne & Elmwood Railway Company, subsequently called the Fort Wayne & Belle Isle Railway Company, was re-enacted and extended in 1880 and the original grant to the Grand River Street Railway Company was re-enacted and extended in 1885, the provisions of the street railway act, above quoted, were in force and by the express terms thereof, the grantees although incorporated under the Train Railway Act, became entitled to the benefit and protection of all provisions of the Street Railway Act. This is true also of the subsequent grants made by the city to the various railway companies which are the constituents of complainant's system, including also the Fort Wayne & Belle Isle Railway Company, which it holds by lease.

The charter of the City of Detroit, approved June 7, 1883, Sections 121 and 122, clothed the Common Council with power over the streets, highways and alleys, to establish, open, widen, extend, straighten, alter, vacate, etc., and generally to "control, prescribe and regulate the manner in which the highways, streets, avenues, lanes, alleys, public grounds and spaces within said city, shall be used and enjoyed."

Section 19 of the ordinance of November 24, 1862, provides:

> "It is hereby reserved to the Common Council of the City of Detroit, the right to make such further rules, orders or regulations as may from time to time be deemed necessary to protect the interests, safety, welfare or accommodation of the public in relation to said railways."

The later ordinances granting consent to railways for the occupancy of the street and extensions of easements previously granted, contained similar provisions.

The statutes and ordinances from which the foregoing quotations have been made, it is believed, comprise all the legislative and municipal enactments invoked by both parties as declaratory of their respective rights and powers.

August 16th, 1899, the Common Council of Detroit passed five ordinances which the Mayor approved, requiring complainant, its successors and assigns and the railway companies named in said ordinances:

> "To keep on sale on its cars in service at all times, tickets to be sold in strips or packages of eight tickets for twenty-five cents, each of which tickets shall be accepted by such railway company, its successors or assigns, for a single ride for any distance in either direction over all lines or routes operated by said railway company, its successors and assigns, on a car on which it is presented and a passenger presenting such ticket or on the payment of one single fare charged by said company, shall be entitled to a transfer ticket good for a continuous ride over any other line or route of said company, provided such transfer ticket is presented on the next regular car of such other route or within fifteen minutes after such passenger leaves the car on which he received said transfer ticket."

The other four ordinances contained a like provision.

It will be seen that these ordinances not only reduced the rate of fare fixed by the original consent ordinances of 1862 and ratified in that of November 14th, 1879, and the other ordinances above recited and which had been recognized as a lawful rate over each separate route or line ever since the street railway service was introduced, but also required complainant to transfer a passenger free of charge over any other of complainant's lines or routes to which he might request a transfer ticket.

It is the claim of complainant that these ordinances violate its agreements with the city, evidenced by the ordinances granting the consent of the city to the use of the

streets by coaplainant, its grantors and predecessors and accepted by the latter as the terms and conditions of the easement granted, and impaired the obligation of its contracts with complainant, its grantors and predecessors, and is null and void. A restraining order was issued, staying the enforcement of the ordinances of August 16th, pending the hearing of a motion for a perpetual injunction. No answer to the bill has been made, but defendant has filed certified copies of the various consent ordinances and the amendments thereto and these copies have been submitted in connection with the charter of the city and the acts of 1855 and 1867 and the amendments thereto as the city's answer to the motion for injunction. Both parties concede the jurisdiction of the Court under the authority of

City Railway Co. vs. Citizens R. R. Co., 166 U. S., 563.

Walla Walla vs. Walla Walla Water Co., 172 U. S., 1.

Hamilton vs. Hamilton Gas Light Co., 146 U. S., 158.

Swan, J.: The controlling question in this case is the effect of the ordinances of consent and their acceptance by the railway companies. These ordinances were enacted under express legislative authority conferred on the city authorities to prescribe the terms and conditions under which an easement in the streets should be granted to street railway companies. The Constitution of Michigan, Section 38 of Article 4, provides:

> "The Legislature may confer upon organized townships, incorporated cities and villages and upon the board of supervisors of the several counties, such powers of a local legislative and administrative character as they may deem proper."

With the two limitations of this broad power, this case has no concern. "Municipal corporations derive their sole

source of power from legislative enactments. * * *" "The power of a municipality to grant an easement in a street to a street railway is not inherent but is derived from the Legislature."

> Street Railway Co. vs. City of Detroit, 110 Mich., 390.
> Detroit Citizens' Street Railway Co. vs. Detroit Railway, 171 U. S., 48.

In the exercise of this constitutional power, the Legislature gave to the city by the acts of 1855 and of 1867, authority to grant or deny to a railway company, the use of its streets for the construction and operation of its railway. The franchise of corporate capacity had been acquired by the railway companies under the laws of the State, and this was all that the Legislature had to bestow. It left the acquisition of the easement in the streets to the action of each municipality from which it was sought, and by making it the subject matter of agreement between the city and the railway company, vested the city with the power to prescribe and the grantee to accept or reject the terms and conditons of consent offered. Both parties had capacity to enter into the contract. The only limitation upon the exercise of that power, was that the State requires that the city's consent should be evidenced by ordinance, and that the acceptance of the railway company, should be in writing. The fact that the early ordinances gave an exclusive right to the grantee has lost significance by the decisions in:

> Street Railway Co. vs. Detroit, 110 Mich., 384, and Detroit Citizens' Street Ry. Co. vs. Detroit Railway, 171 U. S., 48.

The acceptance of the terms and conditions of the city's consent and of the obligations imposed upon, and the reciprocal undertakings given by, the railway company to the city, constitute a sufficient consideration and supply

all the essentials of a contract. It "constitutes a contractual ordinance conferring an easement which is irrevocable."

Mayor of Knoxville vs. Africa C. C. A., 77 F. R., 508.

Township of Hamtramck vs. Rapid Railway, 6 Detroit Legal News, 821.

Iron Mountain R. Co. vs. Memphis, 96 F. R., 128.

Louisville Trust Co. vs. Cincinnati, 76 F. R., 209 (C. C. A.)

Electric Railway Co. vs. Grand Rapids, 84 Mich., 257.

Union St. R. Co. vs. Circuit Judge, 113 Mich., 645-6.

City Railway Co. vs. Citizens' Co., 166 U. S., 567.

The rule which requires a strict construction of the powers of municipal corporations and the equally familiar principle that all public grants must be strictly construed against the grantee, leaving nothing to inference, find no room for application in this case for the grant of authority is explicit and unqualified. The Legislature expressly reserved to itself in the acts of 1855 and 1867, what the Constitution gave it, independent of such reservation, the right to alter, amend or repeal those acts at any time. In the Train Railway Act, the affirmation of this power in Sec. 31 was thus qualified:

> "But such alteration, amendment or repeal shall not operate as an alteration or amendment of the corporate rights of companies formed under it, unless specially named in the act so altering or amending this act. * * *"

The Legislature has not exercised its constitutional or reserved power in any particular affecting this case, except in the enactment of the second proviso to Sec. 34 of the Act of 1855, nor has it delegated, even if it could, the power to the city to modify its consent. On the contrary, by the second proviso of Sec. 34 of the Act of 1855, quoted above,

and Sec. 14 of the Act of 1867, providing that after the consent of a municipality to the use of its streets by a street railway company has been accepted by the latter, "such township, city or village shall not revoke such consent nor deprive the company of the rights and privileges so confererd," it has expressly forbidden any impairment of the grant. The force of this prohibiton is supplemented by Sec. 29 of the same act, giving to street railway companies organized under prior legislation, "the same powers, rights, protection and privileges" and subjecting them "to all the liabilities as are hereby provided for companies and corporations organized under the provisions of this act."

It is plain, therefore, that whatever construction might have been given to Sec. 34 of the Act of 1855 prior to the enactment March 27, 1867, of the second proviso thereto, the inviolability of its consent declared by Sec. 14 of the Act of 1867, was a right and protection acquired under Sec. 29 which could not be nullified by a city ordinance.

People vs. Kirsch, 67 Mich., 539, 543.

In Detroit City Railway vs. Guthart, 51 Mich., 183, construing Sec. 31 of the Train Railway Act referred to supra, Justice Cooley said:

> "The rights intended by that section are the essential and important rights of corporations formed for the particular purposes which the act had in view as distinguished from the privileges and immunities which are not so fundamental, but which may, nevertheless, have value. An attempt to enumerate the rights here would be presumptuous and without value, but, in general terms, it may be said that the franchise to construct and operate a road and to levy and collect remunerative tolls or charges would be corporate rights."

The Acts of 1855 and 1867, being in pari materia, no reason is perceived why this definition of the word "rights"

should not be applied to the same word in Sections 34 of the Act of 1855 and 14 of the Act of 1867.

Reiche vs. Smythe, 13 Wall, 162.

By Section 20 of the Act of 1867, as we have seen, the rate of fare was made matter of agreement between "such company and the corporate authorities of the city or village where the road is located," * * * and, therefore, "when established by agreement," a right vested in the railway company which is protected by Section 29 of the Act of 1867, quoted above, as well as by the Federal Constitution. It is replied to this that Section 34 of the Act of 1855 was added to that act twenty-two days after the Act of 1867 was approved, and must, therefore, be regarded as the latest expression of the legislative will upon this subject; that under the first proviso to that section, prohibiting a railway company from constructing its road in "the streets of any town or city without the consent of the municipal authorities of such town or city, and under such regulations and terms and conditions as said authorities may *from time to time prescribe*," the city was empowered to change the rate of fare. This is not an exact statement of the amendments to Section 34. All that part of the section preceding its second proviso was added April 12th, 1861. The second proviso that:

> "After said consent shall have been given and accepted by the company or corporation to which the same is granted, such authority shall make no regulation or condition whereby the rights or franchises so granted shall be destroyed or unreasonably impaired or such corporation be deprived of the right of constructing, maintaining and operating such railway in the streets in such consent or grant named pursuant to the terms thereof,"

was approved March 27th, 1867. Its clear intent, purpose and effect was to bring the Act of 1855 into harmony with

that of 1867, but primarily and beyond question, to take from the city the authority, if any it had, to prescribe further regulations and conditions, "from time to time," impairing the consent thus granted, and its enjoyment "pursuant to the terms thereof." This is evidenced also by Section 36 of the same Act, also added March 27th, 1867, by which it is provided that:

> "It shall be a sufficient designation of the route or routes thereof (of a street railway) to declare that said railway is to be constructed and maintained in such streets or public ways of the particular city as has been or shall thereafter, from time to time, be granted to said company for that purpose by the proper municipal authorities of such city; and it shall be lawful to build, maintain or extend the railway of such company according to the terms and conditions of such grant or grants." * * *

The Street Railway Act of 1867, entitled: "An Act to provide for the organization of street railway companies," was approved March 5th, 1867. While it does not repeal the Act of 1855, but is in pari materia, yet by its 30th section, quoted supra, it so far displaced it as to require that all street railway companies thereafter formed should be organized under its provisions. This act is complete in itself and in marked contrast with the heterogeneous provisions of the Act of 1855, which, for want of a more suitable statute, was amended to adapt it to objects not within its original scope and purpose. The later act was the product of a more enlightened conception of the character and necessity of the new system of urban passenger transportation and obviously recognized the impolicy and injustice of subjecting the large investments of capital needed for such enterprises, to the caprice of fluctuating municipal bodies. By leaving to the city or village authorities the right to give or withhold consent to the use of its streets by such railways "under such rules, regulations and conditions as

the local authorities might impose," it enabled municipalities to protect themselves by the ordinance of consent, and, by Section 14, secured the protection of the grantee of the servitude by the acceptance of that ordinance as the irrevocable contract of the parties. The justice and necessity of this provision was approved by the same legislature twenty-two days thereafter by adding the second proviso to Section 34 of the Act of 1855, which, differing in phraseology, is identical in purpose and effect with Section 14 of the later act, and, as has been said, was doubtless enacted to harmonize the two acts, the latter of which was made the only basis for the organization of street railway companies thereafter. The second proviso of Section 34 is, therefore, clearly in confirmation and adoption of the spirit and purpose of Sections 14 and 29 of the Act of 1867, not in the least degree detracting from the absolute interdict of Section 14 against the revocation of the consent granted. It does not profess to amend or repeal any part of the Act of 1867 or to qualify the rights it granted or the liabilities it imposed.

This conclusion is confirmed by the fact that the amendment of 1867 to Section 34 of the Act of 1855, was made by proviso, "the general purpose of which is to except the clause covered by it from the general provisions of a statute or some provisions of it, or to qualify the operation of the statute in some particular."

George Banking Co. vs. Smith, 126 U. S., 181; or, as said in Wyman vs. Southard, 10 Wheat., 1, 30:

> "The proviso is generally intended to restrain the enacting clause and to except something which would otherwise have been within it, or in some measure to modify the enacting clause."

Both provisos to Section 34 were evidently made with this intent. The first modified the broad grant of authority to street railway companies to use and operate street

railways by making the consent of the city or village under such regulations, terms and conditions as its authorities might "*from time to time prescribe*" a condition precedent to the use and operation of such railways in the streets of a municipality. The second proviso modified all that preceded it in the section by prohibiting impairment of the rights and franchises named in the accepted grant, or deprivation of the right of constructing, maintaining and operating such railway in the streets in the consent named, "pursuant to the terms thereof" (of the consent). Prior to the enactment of the second proviso the city had never exercised or claimed the power to vary its consent in any degree or particular. That it was competent for the Legislature to withdraw from the city the apparent authority to prescribe further terms and conditions to its consent "from time to time" is unquestionable.

Board of Park Commissioners vs. Common Council, 28 Mich., 239.

New Orleans vs. N. O. Water Works Co., 142 U. S., 91.

The city and the railway companies have, ever since the original ordinances, practically and uniformly construed the consents as controlling their mutual rights and obligations except in those particulars in which they have been changed with the consent of both parties. What the railway companies have consent to do by such modifications as have been made furnishes no measure of its rights under the consents, or sanctions their impairment.

Lake Shore Ry Co. vs. Smith, 173 U. S., 684, 697.

Highland Park vs. Plank Road Co., 95 Mich., 489, 491.

With full knowledge of their provisions, twelve years after the enactment of the second proviso and the Act of 1867, the city authorities also expressly renewed and rati-

fied these ordinances and their acceptance as the lawful agreement of the city and companies. The rights of the parties must be measured by the law as it now stands and by their agreements thereunder.

By the ordinance of November 14th, 1879, Sec. 5, "the powers and privileges conferred or obligations imposed on the Detroit City Railway by the ordinance of November 24 and the amendments thereto, are hereby extended and limited to thirty years from this date." By the ordinance of June 30th, 1880, a like proviso was made relative to the Fort Wayne & Elmwood Street Railway Company (later known as the Fort Wayne & Belle Isle Railway Company), confirming and extending for thirty years its grant under the ordinance of January 31st, 1865. Like ordinances were passed in favor of other lines. The practical construction given by the parties to their agreement prior to November 14th, 1879, ever since the enactment of the second proviso of Sec. 34 of the Act of 1855 and the Act of 1867, a period of 37 years, is a fair standard in itself of their rights thereunder—Chicago vs. Sheldon, 9 Wall., 50-54—and when supplemented and adopted by these confirmatory ordinances, which the statutes authorized, the fact that the original ordinances antedated the second proviso of Section 34, is a matter of no moment. The Act of 1867 and the second proviso of Section 34 of the Act of 1855 should be construed as a ratification of those ordinances.

> City Railway Co. vs. Citizens' Ry. Co., 166 U. S., 567, 569.

The ordinances of 1879 and 1880 and their acceptance had all the force and effect of a new consent, which was authorized by the Legislature and protected both by Section 34 of the Train Railway Act, as it then stood, and by Section 20 of the Street Railway Act of 1867, against de-

struction or impairment by the municipal authorities, and are sustained by sufficient consideration.

City Ry. Co. vs. Citizens' Ry. Co., 166 U. S., 568.

The argument that it is not claimed in the bill that by a reduction of fares from five to three cents the contract is "unreasonably impaired," and, therefore, is a "regulation" which the city authorities may lawfully make under Section 34 of the Act of 1855 and Section 19 of the original consent ordinance, is untenable.

> "An objection to a law on the ground of its impairing the obligation of a contract can never depend upon the extent of the change which the law effects in it. Any deviation from its terms by postponing or accelerating the period of performance which it prescribes, imposing conditions not expressed in the contract or dispensing with the performance of those which are, however minute, or apparently immaterial in their effect upon the contract of the parties, impairs its obligations."
>
> Green vs. Biddle, 8 Wheaton, 184.
> Walker vs. Whitehead, 16 Wall, 314.

That the original and subsequent ordinances which are recited above, accepted by the complainant and its assignors, established the right of the street railway companies to a five-cent fare, is as clear as that the attempted reduction of that fare by the enactment of the ordinances of August 16, 1899, impaired the obligations of the contract of consent between the city and the companies. It is as idle to claim that the change of rate did not "unreasonably" impair that consent as to deny that the proposed reduction of fares is not the deprivation of the railway company's "right of constructing, maintaining and operating such railway in the streets in such consent or grant named, *pursuant to the terms thereof*." By any change of its terms or any regulation diminishing its value or alter-

ing its conditions to the prejudice of either party, a contract is "unreasonably" impaired. It is not the degree, but the fact of impairment that determines the validity of legislation effecting it. In the case at bar, the "regulation" that the company shall sell eight tickets for twenty-five cents, each of which tickets shall be valid for the carriage of a passenger for whose transportation the company, under its agreement with the city, is authorized to collect five cents, is so clearly the deprivation of a right valuable to the company that the effect "goes without saying."

In Detroit vs. Detroit and Howell Plank Road Co., 43 Mich., 140, 146, it was sought to compel the respondent company to remove two and one-half miles of its road from within the city without compensation, and in violation of its chartered rights. The proceedings were taken under the act of the Legislature forbidding the company to take tolls on paved roads within said limitations. Justice Campbell said:

> "What the city claims a right to do, is to deprive the respondent of the privilege any longer to take tolls for travel and traffic on two and one-half miles of its road. If it may do this in respect to one part of the road, it may in respect to any other part. If it may exclude the respondent from Detroit, it may from Howell also, or from any other township on the line, and a single section of the statute may annihilate the property of respondent altogether. A statute which could have this effect would not be a statute to amend franchises, but a statute to confiscate property; it would not be a statute of regulation, but of spoilation."

A fortiori, as the city derives all its powers from the Legislature which has prohibited its recession from its consent, the attempted abrogation of that contract and the deprivation of the rights which it confers is an indefensible usurpation.

The argument that the ordinances of August 16th, 1899, were passed in the exercise of the "police power" of the State by its agent, the city, affords no justification to the defendant. Without attempting to specify what is included in the elastic term "police power," the view taken of the contractual relations of complainant and the city negatives the defense asserted on that ground. In the language of Mr. Justice Peckham:

> "This (the police power) must, however, be exercised in subordination to the provisions of the Federal Constitution. If, in the assumed exercise of its police power, the Legislature of a State directly and plainly violates a provision of the Constitution of the United States, such legislation would be void."
>
> Lake Shore Ry. Co. vs. Smith, 173 U. S., 689, 690.

These ordinances contravene the provisions of the Federal Constitution forbidding the impairment of contracts and the deprivation of property without due process of law and equally the statutes of Michigan, from which alone the city obtained the power to grant its consent, unless that consent has reserved the power to modify its terms and conditions.

This result necessitates the proposition that the ordinances of August 16th, 1899, are a proper exercise of the powers reserved to the city by Section 19 of the ordinances of consent of 1862 and 1865, and, therefore, do not impair the contract of the parties. This contention is without merit. That section reserved the power to enact "such further rules, orders and regulations as may from time to time be deemed necessary to protect the interests, safety, welfare or accommodation of the public in relation to said railways." Similar sections are contained in the later ordinances granting consent to the construction and operation of the new lines owned by complainant. The terms,

"further rules, orders and regulations" for the purposes specified are inapt to express a purpose to vary the "consent, permission and authority" granted, but are a declaration of the right and purpose of the city authorities to "further" exercise the police power in regard to all matters incident to the construction and operation of the road, such as the location of the tracks in the streets, the placing of switches and turn-tables, the repair of the pavement between the tracks, the removal or limitation of the number of tracks, in the interest of public travel (Grand Rapids Railways, 43 Mich., 433; Baltimore Trust Co., 166 U. S., 673), the frequency with which cars should be run for the public convenience, the stopping of cars at street crossings, the use of fenders, the rate of speed to be maintained, the sale of tickets (City of Detroit vs. Railway Co., 95 Mich., 456) and generally to details of the conduct and operation of the railway which experience might show to be necessary in addition to or in amendment of those specified in the consent for the protection of life, the accommodation of the public and the avoidance of injury to private property. Such regulations are not invasions of the contract rights of the company, and are just and reasonable. (Lake Shore & Mich. Southern Railway Co. vs. Ohio, 173 U. S., 285, 305.)

But the right of the grantee to use its franchise in the city and to take the stipulated fare for the carriage of passengers are vested rights of property under the consents, and clearly distinguishable from immunity from the duties and requirements necessitated by the new easement and consistent with its full enjoyment, and from which even the Legislature could not release the grantee.

The entire abolition of fares might, for a time, conduce, in a degree, to the material "interest" and "welfare" of the traveling public and be a public "accommodation," but the rule, order or regulation which would require free trans-

portation of the public would differ only in degree from the ordinances in question, which have no relation to the comfort, safety or welfare of society.

Cooley's Cons. Lim., p. 577.
People vs. Jackson Plank Road Co., 9 Mich., 306.

If the city may sequester two-fifths of the grantee's earnings, why may it not take all? Such a power is neither expressly given, nor can it be implied. It is confiscation. Besides the considerations already stated, which conclusively repel this defense, may be added that the canons of statutory construction also exclude it. The rates of fare having been eo nomine fixed by one section of each of the many ordinances of consent and by Section 20 of the Acts of 1867, are not within the general authority to make "rules, orders or regulations" committed to the discretion of the Common Council by Section 19. The general words of that section must yield to the specific provision fixing the rate of fare.

Horner vs. Collector, 1 Wall., 486, 490.
Reiche vs. Smythe, 13 Wall., 162, 165.

The same rule of interpretation must be applied to municipal ordinances as obtains in construing statutes. A thing which is given in particular shall not be taken away by general words.

Churchill vs. Crease, 5 Bing., 180.

The fundamental principle of construction applicable both to legislative and municipal enactments is that the intention of the Legislature is to govern.

Sedgwick on Stats. & Cons. Law, p. 360.
Pease vs. Whitney, 5 Mass., 380, 382.

It has never been claimed for Section 19 and the corresponding sections in all the numerous ordinances of con-

sent passed by the Common Council that they authorized any interference with the rates of fare prescribed by all the consent ordinances from 1862 to 1899, inclusive. This disclaimer, for a period of thirty-seven years, also negatives the relation of that section to the subject of fares.

The objection to the validity of the consent ordinances that the Common Council was without power to grant an easement in its streets for thirty years, and, therefore, the rate of fares could not be fixed so as to be beyond the control of the city authorities for that period, has been determined adversely to the defendant in Detroit Citizens' Street Ry. Co. vs. City of Detroit, 64 F. R., 628, 646. There is nothing in the charter of the city which sanctions the action of its Common Council.

The arguments have taken a wide range, and many questions have been presented relative to the power of the Legislature to prescribe or change the rates of transportation of railway companies and otherwise alter or amend the organic acts under which they were formed, but those questions are foreign to the issues here involved. While the authorities cited have been carefully examined, nothing has been found which controls the determination of this case.

It follows from what has been said that the motion to vacate the restraining order must be denied, and that the complainant is entitled to an injunction against the enforcement of the ordinances of August 16, 1899, and such injunction will issue accordingly.

Detroit, March 15, 1900.

(Signed) HENRY H. SWAN,
District Judge.

UNITED STATE OF AMERICA—In the Circuit Court of the United States for the Eastern District of Michigan, Southern Division, in Equity.

THE DETROIT CITIZENS' STREET RAILWAY COMPANY

vs.

THE CITY OF DETROIT et al.

EASTERN DISTRICT OF MICHIGAN, } ss.

I, Walter S. Harsha, clerk of the Circuit Court of the United States for the Eastern District of Michigan, do hereby certify that the above and foregoing is a true copy of the opinion of Judge Swan in the above entitled cause as the same appears on file in my office; that I have compared the same with the original, and it is a true and correct transcript therefrom and of the whole thereof.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court, at Detroit, in said District, this nineteenth day of March, in the year one thousand nine hundred, and of the Independence of the United States the one hundred and twenty-fourth.

(Seal.)

WALTER S. HARSHA,
Clerk.

(Ten-cent revenue stamp.)

152.

Br. of Duffield for Appellee.

No. 152.

Filed Oct. 14, 1901.

Supreme Court, U.S.
FILED
OCT 14 1901
JAMES H. McKENNEY,
Clerk.

SUPREME COURT OF THE UNITED STATES.

October Term, 1901.

THE CITY OF DETROIT et al.,
Defendants and Appellants,

vs.

THE DETROIT CITIZENS' STREET RAILWAY COMPANY,
Complainant.

Appeal from the Circuit Court of the United States for the Eastern District of Michigan. In Equity.

BRIEF OF HENRY M. DUFFIELD, FOR COMPLAINANT AND APPELLEE.

MICHAEL BRENNAN and
JOHN C. DONNELLY,
Of Counsel.

DETROIT:
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No. 152.

SUPREME COURT OF THE UNITED STATES.

October Term, 1901.

THE CITY OF DETROIT et al.,
Defendants and Appellants,
vs.
THE DETROIT CITIZENS' STREET RAILWAY COMPANY,
Complainant.

Appeal from the Circuit Court of the United States for the Eastern District of Michigan. In Equity.

BRIEF OF HENRY M. DUFFIELD, FOR COMPLAINANT AND APPELLEE.

STATEMENT OF THE CASE.

The complainant street railway company was incorporated in 1891 under the Michigan Street Railway Act of 1867, Howell's Annotated Statutes, Chapter 95, Vol. 1, p. 908, et seq. (Record, p. 107.)

Under the authority of this statute, hereinafter quoted, it had acquired all the rights, privileges and franchises of the Detroit City Railway, the Grand River Street Railway Company, the Congress and Baker Street and Dix Avenue Railway Companies, the Highland Park Railway Company, and had leased the Detroit, Fort Wayne & Belle Isle Railway. (Record, pp. 107, 109, 111.)

On August 16th, 1899, it was lawfully maintaining and operating this street car system, comprising upwards of

one hundred and thirty-four miles of street railway, in the City of Detroit, under various ordinances of said city, hereafter more especially referred to, which were adopted subsequently to the Street Railway Act of 1867, and the amendments of that year to the Tram Railway Act, to the terms of which ordinances the company and its predecessors had, pursuant to the express requirements of the ordinances, filed consents in writing.

The rates of fare were established in these ordinances, by agreement between the street railway companies and the city, for priods which have not yet expired, at five cents for a single fare, except during certain hours (five-thirty to seven o'clock in the morning, and five-fifteen to six-fifteen in the evening), when tickets could be purchased and used at the rate of eight for twenty-five cents, and there was no general right of transfer from one line to another. The language used in the various ordinances as to fares was:

> "The rate of fare for any distance shall not exceed five cents in any one car or on any one route named in this ordinance." Detroit City Railway, Ordinance of 1862, extended November 14th, 1879, and subsequently by various ordinances. (Record, pp. 29, 35.)
>
> "It shall carry passengers * * * for a single fare of five cents for one continuous trip." Cass Avenue, Congress Street, etc., extensions of Detroit City Railway, Ordinance of January 3d, 1889. (Record, p. 44.) "The rate of fare over such route shall be five cents." Myrtle Street extension to Grand River Street Railway Company, June 27th, 1885. (Record, p. 60.)
>
> "Shall agree to carry passengers for a single fare of five cents for one continuous trip." Crawford and East Congress Street extensions of Grand River Street Railway Company, January 3d, 1889. (Record, p. 60.)
>
> "Passengers conveyed upon said railway in said city shall be charged no more than five cents for any distance." Cass Avenue and Third Street extension to Detroit City Railway, January 3d, 1889. (Record, p. 89.)
>
> "The rate of fare for a single trip shall not exceed five cents for any distance within the city limits." Dix Avenue extension to Detroit City Railway, April 17th, 1886 (Record, p. 63), and Highland Park Railway, June 13th, 1886. (Record, p. 67.)
>
> "The rate of fare for any distance shall not ex-

ceed five cents in any one car." Fort Wayne & Belle Isle Railway Company, July 24th, 1886 (Record, p. 76), and Grand River Street Railway Company, May, 1868. (Record, p. 54.)

"Each passenger * * * shall pay only one fare, the amount of which shall be five cents." Elmwood Avenue and East Lafayette (now Champlain Street) extension Fort Wayne & Belle Isle Railway, December, 1886. (Record, p. 78.)

"Each passenger * * * shall pay only one fare, the amount of which shall not exceed five cents." Extension of Grand River Street Railway Company, January 3d, 1889. (Record, p. 82.)

The Constitution of the State of Michigan provides:

Article IV, Section 38. "The legislature may confer upon organized townships, incorporated cities and villages, and upon the Board of Supervisors of the several counties, such powers of a local legislative and administrative character as they may deem proper."

Howell's Annotated Statutes, Vol. 1, p. 48.

Article XV, Section 1. "Corporations may be formed under general laws, but shall not be created by special act except for municipal purposes."

Howell's Annotated Statutes, Vol. 1, p. 64.

Until the amendment in 1861 to the Tram Railway Act of Michigan, there was no statute authorizing the incorporation of street railway companies.

This amendment provided:

Section 33. "It shall be competent for parties to organize companies nder this act, to construct and operate railways in and through the streets of any town or city in this State."

Section 34. "All companies or corporations formed for such purposes shall have the exclusive right to use and operate any street railways constructed, owned or held by them: Provided, that no such company or corporation shall be authorized to construct a railway under this act through the streets of any town or city without the consent of the municipal authorities of such town or city, and under such regulation and upon such terms

and conditions as said authorities may from time to time prescribe."

Public Acts of Michigan, 1861, p. 11.
Howell's Annotated Statutes, §§3526-3527, Vol. 1, p. 906.

In 1867 this amendment was amended by adding a further proviso:

"Provided, further, that, after such consent shall have been *given and accepted by* the company or corporation to which the same is granted, such authorities shall make no regulations or conditions whereby the rights or franchises so granted shall be destroyed or unreasonably impaired, or such company or corporation be deprived of the right of constructing, maintaining and operating such railway in the street in such consent or grant named, pursuant to the terms thereof."

Public Acts of Michigan, 1867, p. 257.

An additional section was added providing that it should be a sufficient designation, in the articles of association of any street railway company, of its route or routes "to declare that said railway is to be constructed and maintained in such public streets or public ways of the particular city as has been or shall thereafter from time to time be granted to said company for that purpose by the proper municipal authorities of such city; and it shall be lawful to build, maintain or extend the railway of such company according to the terms or conditions of such grant or grants," and that any company theretofore organized might amend its articles of association to conform to this section. (Section 36.)

Howell's Annotated Statutes, Vol. 1, p. 907, §3539.

In 1871 the act was further amended to allow street railways to intersect, cross-join, and unite their railways to others. (Section 41.) And a section added providing "that all the provisions of the act as amended should be applicable to all corporations now organized under this act as though specifically named. (Section 42.)

Howell's Annotated Statutes, Vol. 1, p. 908, §§3534, 3535.

The Detroit City Railway, the Grand River Street Railway Company and the Fort Wayne and Elmwood Avenue Railway were organized under this law. The right of the legislature to alter, amend or repeal this act was thus qualified by Section 31, "but such alteration, amendment or repeal shall not operate as an alteration or amendment of the corporate rights of the companies formed under it, unless specifically named in the act so altering or amending this act."

Howell's Annotated Statutes, ubi sup., §3525.

At the same session of the Legislature a law for the incorporation of street railways was enacted.* Under it street railway companies could be organized with the usual powers, including the right to borrow money and mortgage their property—Section 1—which could, with the consent of the corporate authorities of any city, given by ordinance, construct, own, operate and maintain a passenger street railway in such streets and ways in said city as might from time to time be designated in the ordinance granting such consent under such rules, regulations and conditions as such ordinance should prescribe; *but no such railway company should construct* any railway in the streets of any city * * until the company should have accepted in writing the terms and conditions upon which they were permitted to use said streets. Section 13.

After such consent by said city, and the acceptance thereof by the Street Railway Company, such city should not *revoke such consent or deprive the company of the rights and privileges so conferred.* Section 14.

The rates of face were to "be *established by agreement* between such company and the corporate authorities of the city where the road is located." Section 20.

Any street railway company might purchase, acquire or hire any street railway in any city, owned by another corporation, together with all the real and personal property and "the rights, privileges and franchise of such company," and might use and enjoy the same "upon the same terms as the company whose roads and franchises were acquired might have done." Section 15.

All "the powers, rights, protection and privileges conferred by this act," and all the liabilities imposed by it, were granted to and imposed on "all corporations and companies heretofore organized in this state for the purpose of

*Note.—The sections of the statutes referred to Howells Annotated Statutes Vol. 1, Chap. 95, p. 908 and Chap. 94, p. 900, are copied in full in the appendix to this brief.

building and operating street railways under the statutes then in force." Section 29.

It also provided that all street railway companies and corporations thereafter formed should "be organized under the provisions of this act." Section 30.

> Howell's Annotated Statutes, Vol. I., Chap. 95, pp. 908, 911, 912, 913, §§3536, 3548, 3549, 3550, 3555, 3564, 3565.

The complainant company, and all the other street railway companies whose rights it acquired, except the Detroit City Railway, Grand River Street Railway and the Fort Wayne and Elmwood Avenue Railway, were organized under this law.

Subsequent to the enactment of these laws the Common Council of the City of Detroit, with the approval of the Mayor, adopted ordinances with respect to the several street railway companies, to whose rights complainant has succeeded. These ordinances by their terms and as required by statute, were consented to in writing by said companies. Their provisions as to fares have been quoted above.

In respect to the Detroit City Railway the original ordinance of 1862 (Record, p. 27) was amended in 1879 and extended for a term of thirty years thereafter. (Record, p. 35.)

This ordinance was attacked by the city and its validity was sustained by the U. S. Circuit Court of Appeals for the Sixth Circuit, before Mr. Justice Jackson, Circuit Judge Lurton and District Judge Barr.

> Detroit Citizens' Street Railway vs. City of Detroit, 64 Federal R., p. 628.

The Fort Wayne and Elmwood Railway took its grant of rights in the street through an ordinance of 1865, which was extended to thirty years from June 30, 1880, by the ordinance of that date. (Record, pp. 156, 160.)

The Grand River Street Railway was organized in 1868 after the amendments of 1867 to the Tram Railway Act and the passage of the General Street Railway Law. Its original ordinance was adopted in May, 1868 (Record, p. 52), and extended by ordinance of 1885. (Record, pp. 57-58.)

The ordinances governing all the other street railway companies were adopted after the amendment of 1867 to the Tram Railway Act and the enactment of the General Street Railway Law of 1867, above quoted.

At the time of the purchase by the complainant com-

pany in 1891 of its various lines of street railways, they were operated by the companies then owning them under the above named and other ordinances adopted by the Common Council of the City of Detroit, under the authority of and in obedience to Section 20 of the Street Railway Act, which required that the rates of fare should "be established by agreement between company and the corporate authorities of the city." The companies had accepted these ordinances in writing, as required by the statute, and the rates of fare under these ordinances had thus been "established by agreement" at five cents for a single fare, with no general right of transfer.

The case shows that the complainant company, in reliance upon this legislation and the municipal ordinances thereunder, in order to procure the funds necessary for the construction, repair, reconstruction from horse railway to electric railway system, and operation of its various lines of street railway in the streets of Detroit, had borrowed upwards of eight million dollars, and to secure the same had issued therefor its gold bonds to the amount of more than eight million dollars, secured by mortgages or trust deeds on all its real and personal property, including all its rights and franchises under the state and municipal legislation heretofore quoted, which said bonds are held by purchasers, who took and paid for the same in the full faith and belief of the contractual validity of said legislation and ordinances. (Record, p. 172.)

On the 16th day of August, 1899, and while all the above cited statutes and ordinances were in full force, the Mayor and Common Council of the City of Detroit adopted five ordinances similar in terms to the following:

An ORDINANCE to require the Detroit Citizens' Street Railway, its successors and assigns, to keep on sale and to sell eight (8) tickets for twenty-five cents and give transfers to passengers upon the lines of street railway operated by the said company in the City of Detroit.

It is hereby ordained by the People of the City of Detroit:

Section 1. That the ordinance of said city, approved November 14, 1879, entitled "An ordinance supplementary to an ordinance entitled 'An ordinance to permit certain persons to establish and locate certain railways in the City of Detroit,' approved November 24, 1862, and the amendments thereto, and for other purposes," be, and the same is hereby amended by adding thereto a new section to stand as Section 6a, and read as follows:

Section 6a. That the Detroit Citizens' Street Railway Company, its successors and assigns, shall keep on sale on its cars in service at all times tickets to be sold in strips or packages of eight tickets for twenty-five cents, each of which tickets shall be accepted by said railway company, its successors and assigns, for a single ride for any distance in either direction over the lines or route operated by said railway company, its successors and assigns, on a car on which it is presented; and a passenger presenting such ticket, or upon payment of one single fare charged by said company, shall be entitled to a transfer ticket good for a continuous ride over any other line or route of said company, provided such transfer ticket is presented on the next regular car of such other route within fifteen minutes after such passenger leaves the car on which he received said transfer ticket. This ordinance shall not be construed to affect in any manner the line or lines of street railway owned by the Detroit United Railway.

Section 2. This ordinance shall take immediate effect. (Record, p. 17.)

The complainant company filed the bill in this case in the Southern Division of the Circuit Court of the United States for the Eastern District of Michigan, in Equity, to restrain the enforcement of these ordinances and have them declared void as impairing the obligation of the contract between it and the city under the prior ordinances above cited. (Record, pp. 1 to 17.)

The Circuit Court granted a restraining order and upon a final hearing issued a perpetual injunction against the city. (Record, p. 105.)

The opinion of the Court on the merits of the case was delivered on the denial of the motion to vacate the restraining order and is found on Record, p. 86, et seq.

The city now brings the case here on appeal.

The complainant and defendants are citizens of Michigan, but the jurisdiction of the Federal Court is invoked by the bill under the authority of

City Railway Company vs. Citizens' Railroad Company, 166 U. S., 557.

Walla Walla vs. Walla Water Company, 172 U. S., 1.

Hamilton vs. Hamilton Gas Light Co., 146 U. S., 158.

And Regan vs. Farmers' Loan and Trust Co., 154 U. S., 362.

It was not disputed in the Court below. (Record, p. 97.)

BRIEF.

I.

The provisions in the ordinances giving to the Detroit City Railway and to the other grantors of the complainant company the right to fix fares within the limit of five cents for a single fare, when accepted by the company, constituted an irrevocable contract with the city, which passed to the complainant company on its purchase of the property, franchises, rights and privileges of its grantors.

This is so clear in principle and has been so repeatedly decided that argument is unnecessary.

The Supreme Court of Michigan in several cases has so held with respect to the ordinances in the case at bar of the Detroit City Railway of 1879 and of the Grand River Street Railway Company of 1885.

City of Detroit vs. Detroit City Railway, 76 Mich., 421.

Detroit Citizens' Street Railway Company vs. Common Council, 85 N. W. Rep., 96.

Same case on petition for rehearing, id, p. 107.

And under a similar ordinance in the Electric Co. of Grand Rapids vs. Common Council, 84 Mich., 257.

The same rule was declared in respect of the Michigan Central R. R. charter by which the company were given the right to fix the rates to be charged for the transportation of passengers within the limit of the maximum rate therein prescribed of three cents a mile.

Pingree vs. Michigan Central Railroad Co., 118 Mich., 314,

in which Hooker, Justice, collates many decisions, among others:

New Orleans Gas Co. vs. Louisiana Light Company, 115 U. S., 650, and cases there cited.

Electric Railway Co. vs. Grand Rapids, 84 Mich., 257.

Township of Hamtramck vs. Rapid Railway, 84 Mich., 257.

Union Street Railway Co. vs. Circuit Judge, 113 Mich., 645.

The United States Circuit Court of Appeals for the Sixth Circuit, Mr. Justice Jackson presiding, so held in respect to the ordinance of 1879 here in question, in the Detroit Citizens' Street Railway vs. City of Detroit, 64 Fed., 629, a writ of certiorari to review which was denied by this court in City of Detroit vs. Detroit Citizens' St. Ry. Co., 163 U. S., p. 583, and which was held to be *res adjudicata* upon an application of the city for a mandamus to the Attorney-General to file a quo warranto against the company to test the validity of the ordinance.

> City of Detroit vs. Attorney-General, 103 Mich., p. 612.

Also as to same ordinance by the Circuit Court of the United States for the Eastern District of Michigan, Taft, J., in

> City of Detroit vs. Detroit Citizens' Street Railway Co., 60 Fed., 161, 171.

These decisions are confirmed by this Honorable Court upon an ordinance and state of facts substantially like those in the case at bar.

> City Railway Company vs. Citizens' Street Railroad Co., 166 U. S., 557-567,

where it is said: "This proposition" (the city ordinance) "when accepted by the company and the road built and operated as specified became a contract which the state was not at liberty to impair during its continuance."

To the same effect:

> Louisville Trust Co. vs. Cincinnati (C. C. A.), 76 Fed. R., 209.
>
> Mayor, etc., of Knoxville, vs. Africa (C. C. A.), 77 Fed. R., 501, 507, 508,

where it is said, Lurton, J.:

> "What is the extent of the power intrusted to the city government? The answer is plain. It is to 'consent' to the occupation * * * of the streets of the city * * * as shall be deemed in the interest of the public. The consent, when given by ordinance duly passed, constitutes a grant of a right of way in and on the streets named or described in the ordinance, and constitutes a contractual ordinance conferring an easement which is irrevocable."

Cleveland City Railway Company vs. Cleveland, 94 Fed. R., 385 (1899), holds:

City ordinances making grants of franchises to street railroad companies on specified conditions, when accepted by the companies, constitute contracts, which cannot be annulled or amended except by consent of both parties, and which are protected from impairment by the fourteenth constitutional amendment.

A federal court of equity may grant relief by injunction against a city ordinance which impairs the contract rights of complainant, or deprives him of his property without due process of law.

The statutes of Ohio confer power upon municipalities to determine the conditions of the grant of a franchise to a street railroad company, including the rates of fare to be charged, but no power to thereafter prescribe rates of fare; and where the grant itself fixes the rate of fare a reserved right of regulation does not authorize the municipality to thereafter change it during the life of the grant.

So also the case of Africa vs. Board of Mayor and Aldermen, 70 Fed., 730.

The franchise of a street railway company to operate its road and use the streets of a city is derived from the Legislature, through its charter, and not from the municipal corporation, though the consent of the latter may be required to the exercise of its authority; and the consent of the municipality, when once given, cannot, in the absence of a statute authorizing its withdrawal, be withdrawn.

The ordinance by which the consent of the city was given to the construction of the road provided that the rights conferred should exist during the corporate existence of the company. Held, that the city was without power, and could not, from such ordinance, be supposed to have intended to limit its consent to any less period than the duration of the franchise granted by the State.

Held, further, that under the provisions in the statute relating to consolidation of railway companies, that the consolidated company should have all the rights, etc., and be subject to all duties, of the constituent companies, the Consolidation of the Knoxville Co. with the other companies worked a change of name, the franchise in the streets of the City of Knoxville passing to the new company, and the consent of the city was not terminated by extinguishment of the companies to which it was granted.

In so far as it it applicable to the case at bar, this decision was affirmed by the U. S. Circuit Court of Appeals

for the Sixth Circuit, in Mayor, etc., of Knoxville vs. Africa, 77 Fed., pp. 501, 510, 512.

It is said by the Supreme Court of Mississippi, in Stone vs. Yazoo & Miss. R. R. Co., 62 Miss., 607 (which is approved by this Court in Railroad Commissioners' Cases, 116 U. S., 307): "If anything is or ever can be settled in American constitutional law, the sanctity and inviolability of a contract between a State and individuals in the shape of a charter for a business enterprise, accepted and acted on by the corporators on the faith of its terms and provisions, must be so regarded."

It would seem safe to rest complainant's case on these and many other like decisions which could be cited, but the counsel for the city has filed such a lengthy brief in opposition to their conclusions that out of abundant caution we will discuss the case more in detail.

II.

The ordinances do not purport to regulate fares, but attempt an unlawful discrimination between passengers against the legal rights of the company.

a. The ordinances complained of do not change the rate of single fares, but require the company to keep for sale at all times on its cars in service strips or packages of eight tickets, to be sold for twenty-five cents, each of which tickets shall be accepted by the railway company for a single ride for any distance in either direction over its line on the car on which it is presented.

b. They further require the street railway company to grant on presentation of one of said tickets, or on payment of a single fare of five cents, a transfer ticket good for a continuous ride on any other line or route of the company, provided such transfer ticket is presented on the next regular car of such other route within fifteen minutes after the passenger leaves the car on which he received the transfer ticket.

The purpose and intent of the ordinances are to reduce the price of a single fare from five cents to three and one-eighth cents, only to those who buy a number of tickets, and to compel the company to give an additional ride for the reduced fare. To illustrate:

On payment of five cents, or presentation of an "eight-for-a-quarter ticket," one may get on a car of the Brush Street line at the Detroit & Milwaukee Junction, in the

northeastern part of the city, ride to within a block of the river at the foot of Woodward avenue, a distance of about six miles; spend ten or fifteen minutes about his business or his pleasure, and take a transfer to the Woodward Avenue line car, running in a general way parallel to Brush street, and carrying him out to the city limits at the northerly end of the city, a further distance of about four miles. Thus any person living on either Woodward avenue or Brush street, which run parallel to each other and are but two blocks apart, may take either line to the center of the city or to the river; spend fifteen minutes there, and then ride back on the other line to within two blocks of his residence or place of business upon payment of but one fare. For it must be remembered that the transfers are not limited to carriage in a generally continuous direction, but the ordinance requires the company to give a transfer ticket "over any other line or route of said company." Or he may take a car at the Biulevard, on the Grand River Avenue line, at the city limits, limits, and ride along Grand River, Woodward and Jefferson avenues to the Belle Isle Park Bridge, a distance of about seven miles; spend fifteen minutes looking at the river, or attending to any business he may have there, and then compel the company to carry him on a transfer ticket back from that point along the Congress and Baker Street and Dix Avenue lines, which run generally parallel to Jefferson avenue, to the Township of Springwells, on the extreme westerly limits of the city. In other words, under these ordinances the company must give, to persons buying tickets, two rides for three and one-eighth cents, and to all other passengers two rides for five cents, for which they are now entitled to charge ten cents.

The provision as to sale of tickets at reduced rates is similar in legal effect to the act of the Michigan Legislature which was considered by this Court in

> Lake Shore Railway vs. Smith, 173 U. S., pp. 684, 692,

where it was held that the act was not a legal regulation of rates of fare and that it impaired the contract rights of the railway company.

Mr. Justice Peckham, speaking for the Court, says:

> "The question is presented in this case whether the Legislature of the State, having power to fix maximum rates and charges for the transportation of persons and property by railroad companies, with the limitations above stated, and having power to

alter, amend or repeal their charters, within certain limitations, has also the right, after having fixed a maximum rate for the transportation of passengers, to still further regulate their affairs and to discriminate and make an exception in favor certain persons, and to give them a right of transportation for a less sum than the general rate provided by law.

It is said that the power to create this exception is included in the greater power to fix rates generally; that having the right to establish maximum rates, it therefore has power to lower those rates in certain cases in favor of certain individuals, while maintaining them or permitting them to be maintained at a higher rate in all other cases. It is asserted also that this is only a proper and reasonable regulation."

"It does not seem to us that this claim is well founded. We cannot regard this exceptional legislation as the exercise of a lesser right which is included in the greater one to fix by statute maximum rates for railroad companies. The latter is a power to make a general rule applicable in all cases and without discrimination in favor of or against any individual. It is the power to declare a general law upon the subject of rates beyond which the company cannot go, but within which it is at liberty to conduct its work in such a manner as may seem to it best suited for its prosperity and success. This is a very different power from that exercised in the passage of this statute. The act is not a general law upon the subject of rates, establishing the maximum rates, which the company can in no case violate. The Legislature having established such maximum as a general law now assumes to interfere with the management of the company while conducting its affairs pursuant to and obeying the statute regulating fares and charges, and notwithstanding such rates it assumes to provide for a discrimination, an exception in favor of those who may desire and are able to purchase tickets at what might be called wholesale rates, a discrimination which operates in favor of the wholesale buyer, leaving the others subject to the general rule" (pp. 690, 691).

"It thus invades the general right of the company to conduct and manage its own affairs, and compels

it to give the use of its property for less than the general rate to those who come within the provisions of the statute, and to that extent it would seem that the statute takes the property of the company without dut process of law" (p. 691).

"The right to claim from the company transportation at reduced rates by purchasing a certain amount of tickets is classed as a convenience. As so defined, it would be more convenient if the right could be claimed without any compensation whatever. But such a right is not a convenience at all within the meaning of the term as used in relation to the subject of furnishing conveniences to the public. And also the convenience which the Legislature is to protect is not the convenience of a small portion only of the persons who may travel on the road, while refusing such alleged convenience to all others, nor is the right to obtain tickets for less than the general and otherwise lawful rate to be properly described as a convenience. If that were true, the granting of the right to some portion of the public to ride free on all trains and at all times might be so described. What is covered by the word "convenience" it might be difficult to define for all cases, but we think it does not cover this case. An opportunity to purchase a thousand-mile ticket for less than the standard rate we think is improperly described as a convenience."

"The power of the Legislature to enact general laws regarding a company and its affairs does not include the power to compel it to make an exception in favor of some particular class in the community and to carry the members of that class at a less sum than it has the right to charge for those who are not fortunate enough to be members thereof. This is not reasonable regulation. We do not deny the right of the Legislature to make all proper rules and regulations for the general conduct of the affairs of the company, relating to the running of trains, the keeping of ticket offices open and providing for the proper accommodation of the public."

"This act is not one like establishing certain hours in the day during which trains shall be run for a less charge than during the other hours. In such case it is the establishing of maximum rates of fare for the whole public during these hours, and it is not a dis-

> crimination in favor of certain persons by which they can obtain lower rates by purchasing a certain number of tickets by reason of which the company is compelled to carry them at the reduced fare, and thus, in substance, to part with its property at a less sum that it would be otherwise entitled to charge" (p. 691).

The ordinances complained of by necessary implication make these tickets good during the entire life of the grant of the use of the streets in the prior ordinances and in this respect is within the opinion, as follows:

> "The act also compels the company to carry not only those who choose to purchase these tickets, but their wives and children, and it makes the tickets good for two years from the time of the purchase. If the Legislature can, under the guise of regulation, provide that these tickets shall be good for two years, why can not it provide that they should be good for two years or ten years, or even a longer term of years? It may be said that the regulation must provide for a reasonable term. But what is reasonable under these circumstances? Upon what basis is the reasonable character of the period to be judged? If two years would and five years would not be reasonable, why not? And if five years would be reasonable, why would not ten? If the power exist at all, what are the factors which make it unreasonable to say that tickets shall be valid for five or for ten years? It may be said that the circumstances can change within that time. That is true, but circumstances may change just as well within two as within five or ten years. There is no particular time in regard to which it may be said in advance and as a legal conclusion that circumstances will not change. And can the validity of the regulation be made to depend upon what may happen in the future, during the running of the time in which the legislation has decreed the company shall carry the purchaser of the ticket? Regulations for maximum rates for present transportation of persons or property bear no resemblance to those which assume to provide for the purchase of tickets in quantities at a lower than the general rate, and to provide that they shall be good for years to come. This is not fixing maximum rates, nor is it proper regulation. It

is an illegal and unjustifiable interference with the right of the company" (pp. 692, 693).

b. The provision as to transfers is not valid. It is not a regulation of fares. It is a requirement that the company shall give two rides for one fare; shall stop a car on another of its routes to take on a passenger, carry him to his destination and again stop the car to let him off without any compensation whatsoever. The illustration given above shows how detrimental this transfer requirement is to the company, under the peculiar street plan of Detroit.

This question was passed upon in

Old Colony Trust Co. vs. City of Atlanta, 83 Fed., 45.

The Court held that:

"One continuous ride for a single fare is one thing, and two or more rides, with the necessary stoppage and letting passengers off and letting them on, is another and entirely different thing. Many reasons have been urged in argument, and others might be suggested, which in our opinion make a broad distinction between the two classes of service, namely, between a continuous ride in one car and a ride requiring transfers from one or more cars to others. Unquestionably this ordinance, as to its feature requiring transfers, is a very broad exercise of municipal power. It appears to go to the limit of municipal control even under legislative authority. The power to pass the ordinance should be clearly shown. On the contrary, it is clear to us that the city is without such power."

III.

The rights of the complainant company are to be determined by the amendments to the Tram Railway Act, the General Street Railway Act of 1867 and the subsequent amendments up to 1899 and the ordinances adopted thereunder, and not by the Train Railway Act as amended in 1861 and the ordinances adopted under it.

This is tacitly admitted by the counsel for the city except as to the rights of the complainant derived from the Detroit City Railway Company and the Fort Wayne and Elmwood Railway, which were incorporated under the amendment of 1861 to the Tram Railway Act and obtained their ordinances in 1862 and 1865. Also as to the Grand River Street Railway Company, which was incorporated under Chapter 94, Howell's Statutes (Tram Railway Act) in 1868, although the Street Railway Act enacted prior to that date forbade any incorporation of street railway companies except under its provisions.

It is plain, however, that the powers of the Common Council were governed then as to any street railway company by the Street Railway Act and the amendments of 1867 to the Tram Railway Act.

As to these three companies he asserts that "their powers and rights must be construed solely with reference to the act under which the original companies were incorporated." But this contention is in direct contradiction to section forty-two of the Tram Railway Act, which made all the provisions of the act as amended applicable to all corporations now organized under it as though specially named, and also to section 29 of the Street Railway Act, which expressly provides "all companies and corporations heretofore organized in this state for the purpose of building and operating street railways under the statutes then in force shall have the same powers, rights, protection and privileges as are hereby provided for companies and corporations organized under the provisions of this act." No claim is made and none can properly be made by the city of any lack of power in the legislature to make this provision. It is said by this Court in Citizens' Street Railway vs. Detroit Railway, 171 U. S., pp. 48, 52, quoting with approval the Supreme Court of Michigan in same case, 68 N. W. R., 304, "and in conferring those (local, legislative and administrative) powers it is not to be dis-

puted that the legislature may give extensive capacity to acquire and hold property for local purposes or it may confer authority within the narrow bounds, and what it thus confers it may enlarge, restrict or take away at pleasure."

Even as to the original ordinances of 1861 and 1865, granted while the statute still reserved to the city the right of regulation from time to time, we submit the proviso amendment of 1867 prohibiting any change in the terms of consent detrimental to the company became at once binding upon the city as a limitation upon its powers in the future.

But passing that qustion, which is not essential to the case: How can the claims of the city to act in 1899 under the 1861 amendment be sustained in the face of its previous action in 1879 and 1880 and 1885?

When the city passed the extension ordinances of those years the Street Railway Act was in full force. One section expressly declared that the rate of fares should be established by agreement, and another section declared that all companies theretofore organized should have the same powers, rights, *protection* and privileges provided for in the act as amended. Thereafter the city repealed the original ordinances of consent in some respects and extended them for thirty years in all other respects, including the rates of fare, and the companies filed their consents thereto in writing. It certainly needs no argument to show that this action was taken under and is to be governed by the legislation in force in 1867 and spbsequently until 1879.

In support of his position counsel refers to the doubtless accidental fact that the second proviso to section 34 of the Tram Railway Act was enacted March 27, 1867, while the Street Railway Act was passed March 5, 1867.

If this fact might have had some weight in construing the rights of the grantor companies under their original ordinances, which we deny, it certainly cannot have any effect under the extension ordinances of 1879, 1880 and 1885.

The limitation of the power of the city in the Tram Railway Act after 1867 was: that after the city had proposed its consent upon certain terms, and conditions, and the company had accepted them, the city was prohibited from any further action which would "deprive" the company "of the right of constructing, maintaining and operating such railway in the street in such consent or grant named *pursuant to the terms thereof.*"

The limitation in the Street Railway Act was plain and precise, i. e., that the city could not prescribe rates of fare,

but could only establish them by agreement with the company.

This contention also overlooks or puts aside the amendments of 1867 to the Tram Railway Act, in connection with the Street Railway Act of 1867, which must be construed *in pari materia* and the extensions and amendments to the ordinances enacted and adopted subsequent thereto, and is directly at variance with the decision of the U. S. Circuit Court of Appeals for the Sixth Circuit (Mr. Justice Jackson presiding) in Detroit Citizens' Street Railway vs. City of Detroit, 64 Fed. R., p. 629.

The Court held that the amendments to the Tram Railway Act in 1867 and the general street railway law of the same year being *in pari materia*, must be construed together, and that the ordinance of 1879 "became a binding and irrevocable agreement" (p. 631).

The Court, speaking through Judge Lurton, said:

> "This conclusion seems to rest the case upon the assumption that the power of the city to grant an easement is found alone in the Train Railway Act, and to exclude from consideration, in construing that act, the peculiar constitutional policy of the State, limiting the legislative power in the matter of direct interference with the purely local concerns of the cities and chartered villages of the State. It also excludes from consideration the general charter powers of the City of Detroit over its streets; *it fails to read, in connection with the Train Railway Act, the more elaborate Street Railway Act passed in 1867*, and in full force and effect when the extension ordinance was passed, and attaches little importance to the general purpose the Legislature had in view when it undertook to provide for the establishment of street railway companies. Any conclusion drawn alone from an artificial construction of the Train Railway Act, and which ignores in so large a degree the primary canon of construction which requires that effect shall be given to the intent of the law-making power, and that the intent shall be ascertained in every legitimate way, must bring about an unsatisfactory result (p. 639).
>
> The just, reasonable, and fair interpretation of the provision in each act requiring consent is that nothing in either act shall be construed as authorizing any such road to occupy the streets of any

city with its tracks and cars without first obtaining from such city the right of way necessary, which right may be granted to the city upon terms and conditions satisfactory to it and acceptable to the company, and that this consent to such construction and occupancy shall not be subject to repeal or alteration when granted and accepted."

"However this may be, we are of the opinion that these acts do directly confer power to consent to such use of streets, and that, when such consent is once given and accepted, it is irrevocable for the term fixed by the grant" (p. 643).

The opinion further declares that the rights of the complainant company were to be determined under the amending ordinance of 1879.

"That consent was to the grantees named and described, and their 'successors or assigns.' The ordinance of 1879 was not a new grant or a new consent; it was confessedly an extension of the old grant of consent, upon the terms and conditions of the old consent, except in so far as those terms were readjusted. It follows that the extension of that term was a grant to the Detroit City Railway Company and its successors and assigns. While, therefore, neither party supposed that it was in the power of the City Council to extend the corporate life or corporate franchises of the Detroit City Railway Company beyond the term prescribed in the law which gave it birth, yet it was supposed and believed by each that the value of the extended term would consist in its assignability to a grantee endowed with the franchises essential to the enjoyment of the city's consent to the use of its streets for street railway purposes."

As has been stated, this decision was sustained by this honorable Court and a writ of certiorari refused.

City of Detroit vs. Citizens' Street Railway Co., 163 U. S., p. 583.

And was held by the Supreme Court of Michigan to be res adjudicata to the City of Detroit for a mandamus to the Attorney-General to file a quo warranto against the company.

City of Detroit vs. Attorney-General, 103 Mich., p. 612.

IV.

All the claims of the city have been decided in favor of the complainant by the decisions of this Court and the United States Circuit Court of Appeals for the Sixth Circuit in previous litigation between the City and complainant.

The Corporation Counsel claims the city has authority to adopt the ordinances complained of upon the following grounds:

> 1. "The Common Council of Detroit possessed no authority to pass the various ordinances under which the complainant is operating its road, except such as was conferred upon it by express grant of the Legislature of the State of Michigan" (p. 8 of Mr. Tarsney's Brief).
>
> 2. "The terms employed in the various ordinances do not constitute a contract. The language employed to make a contract must be of such a clear and unambiguous character that it will admit of no reasonable construction consistent with the reservation of the power" (p. 37, *id.*).
>
> 3. "Franchises are always granted subject to the police power" (p. 61, *id.*).
>
> 4. "The police power cannot be delegated or bargained away, nor can the corporation by any contract hamper itself in the exercise of it" (p. 72, *id.*).
>
> 5. "The regulation of fares in the ordinances in question may be supported by the reserve power of alteration, amendment or repeal, contained in the constitution and statutes of Michigan" (p. 86, *id.*).

And in an unsigned addendum attached to the brief;

> that the ordinances granting the present rights in the streets to The Detroit City Railway, The Grand River Street Railway, and the Fort Wayne and Elmwood Railway are void because they amended the previous ordinances by general words and did not re-enact and publish them at length.

All these claims except the last are completely disposed of by the decision of the United States Circuit Court of Appeals for the Sixth Circuit, in a former suit between the city and the complainant, quoted from above, and the principles enunciated by this Court in the opinion in City Railway Company vs. Citizens' Railroad Company, 166 U. S., p. 653.

In the case first cited (64 Fed., 628) the city filed a bill in November, 1892, against the complainant company in this case for a mandatory injunction upon the Company to remove its tracks from the public streets and restrain its further operation of its street railway.

The claim for this relief was made on the ground that the grant of rights in the streets conferred in the ordinance of 1879 of the City of Detroit for thirty years from November 14th, 1879, was void and in excess of the power of the Common Council to grant or the Detroit City Railway to accept because the corporate life of the Detroit City Railway would expire in May, 1893.

The U. S. Circuit Court of Appeals for the Sixth Circuit held:

That the Detroit City Railway was capable of taking a grant of a right to use the streets of the city for its railway for a term extending beyond its own corporate franchise and that the interest granted was assignable (p. 628).

That under the amendments of 1861 to the Tram Railway Act of 1855 authorizing the organization of street railway companies with a proviso that no such company shall be authorized to construct a railway through the streets of a city without the consent of the municipal authorities and under such regulations and upon such terms and conditions as they might from time to time prescribe and the further proviso of 1867 that after such consent had been given and accepted such authorities should make no regulations or conditions whereby the rights or franchises so granted should be destroyed or unreasonably impaired or such company be deprived of the right of constructing, maintaining and operating such railway "in the streets in such consent named pursuant to the terms thereof," and the similar provisions in the general street railway act when construed together with the general charter powers of the City of Detroit; the "consent" required was not a merely implied power and therefore to be strictly construed, but was directly conferred, and authorized a grant of such easement of way in the streets as was requisite for the purposes to be accomplished, and as such power was conferred without express words of limitation and

the terms and conditions on which the grant was to be made were left to the discretion of the local government the term of such a grant was not necessarily limited by the duration of the franchises of the grantee (pp. 628, 629).

That the consent was to the grantees named and described and their successors or assigns. And the ordinance of 1867 was an extension of the old grant (of 1862) upon the terms and conditions of the old grant, except in so far as these terms were readjusted (p. 632).

That the extension of the term from 1893 to 1909 was the sole consideration for the assumption by the company of the new burdens imposed; was a sufficient consideration accepted in writing as required by law and "became a binding and irrevocable agreement."

In the course of the extended litigation in the case the right of the city to have compelled the company, without its consent, to sell eight tickets for twenty-five cents during certain hours of the day (to which the company had agreed in accepting the ordinance of 1879) became material in considering whether the city was estopped to allege the invalidity of the ordinance.

City of Detroit vs. Detroit Citizens' Street Railway, 60 Fed. R., pp. 161, 171.

The Circuit Court held, in an opinion by Taft, J.:

> "By Section 8 of the ordinance of 1862 it was provided that the rate of fare for any distance shall not exceed five cents in any one car or on any one route named in this ordinance. By the ordinance of 1889 which reaffirmed the extension of the grant contained in the ordinance of 1879, it was provided that between the hours of 5:30 and 7:00 in the morning and between the hours of 5:15 and 6:15 in the evening, passage should be furnished upon tickets to be sold at the rate of eight tickets for twenty-five cents. These were known as working men's tickets. The tickets were voluntarily sold by the new companies at stations along the line. The ordinance of February 4, 1893, was passed to compel the sale of these tickets upon the cars. The company refused to obey and was prosecuted criminally at the instance of the city and fined three hundred dollars. After the validity of a similar ordinance had been sustained by the Supreme Court of the State, the company acquiesced and sold the tickets on the cars. I was at first in-

clined to the opinion that the provision in the ordinance of 1862 as to fares was a limitation upon the company only, and would not prevent a reasonable regulation of fares by the Common Council under Section 19 of the same ordinance."

"The argument of counsel for the company has convinced me that I was wrong, and that in the provision of Section 8 in the ordinance of 1862 there is a necessary implication, binding as a contract on the city, that the company may, if it chooses to do so, charge five cents for each fare. It therefore follows that the obligation upon the company to sell tickets at the rate of eight for twenty-five cents for passage during any hours of the day, was a change in the stipulation of the ordinance of 1862 and an additional obligation and burden upon the company imposed by the ordinance of 1889, which expressly reaffirmed the grant until 1909. It is clear, therefore, that the ordinance of February 4, 1893, compelling the sale of working men's tickets was a recognition by the city of the ordinance of 1889 and the strongest affirmation that it had the right to enforce against the new companies the obligations of that ordinance."

This decision expressly denied the power of the city to adopt an ordinance compelling the company to sell only *during certain hours* of the day the same kind of tickets which the ordinances in this case require shall be sold at all hours.

The case of the

City Railway Company vs. Citizens' Railroad Company, 166 U. S., 557,

like the case at bar, was a bill filed by the street railway company to restrain action by the City of Indianapolis under an ordinance adopted subsequently to that under which the company was operating its railway; like the case at bar, the complainant was the grantee of the original street railway company; like the case at bar, the terms of the original ordinance had been modified, and the term of the grant of rights in the street contained in the first ordinance had been extended; like the case at bar, the street railway act of Indiana, under which the street railway company was incorporated and the City of Indianapolis was acting in adopting the ordinances, con-

tained a reservation of the right to amend or repeal the law at any time. This court held:

1. That the United States Circuit Court had jurisdiction, although both parties were citizens of Indiana.

2. That the right of repeal reserved to the legislature in the street railway act of Indiana was not delegated to the city government.

3. That the Citizens' Railroad Company had a valid contract with the city which would not expire until January, 1901, and that the conflicting contract of the city with the City Railway Company was invalid.

In the opinion it is said:

"The original ordinance of January 18th, 1864, was plainly a proposition on the part of the city to grant to the company the use of its streets for thirty years in consideration that the lay its track and operate a railway thereon under certain conditions prescribed by the ordinance. This proposition, when accepted by the company, and the road built and operated as specified, became a contract which the State was not at liberty to impair during its continuance."

This language aptly describes the effect of the Detroit City Railway extension ordinance of 1879, and the similar extension ordinances of the Grand River Street Railway and the Fort Wayne and Elmwood Railway Company.

The validity of these Detroit City Railway ordinances of 1879 and 1887, as to the tax provisions, were raised by the city before the Supreme Court of Michigan in City of Detroit vs. Detroit City Railway Co., 76 Mich., 421; and again passed upon in Detroit Citizens' St. Ry. vs. Common Council, 85 N. W., 96, 106, and in same case on petition for rehearing, 86 N. W., p. 809.

In the first case the court held that the arrangement between the city and company as to taxes, in the ordinances of 1879 and 1887, was "a contract unequivocal that this privilege shall be in lieu of all city taxes except the land tax."

In the second case the court held: "When the city saw fit to make its easements and local taxes the subject of contract, the agreement bound both parties, and there is no reason for requiring the private corporation to live up to every promise of the contract and permitting the municipal corporation to disregard it at will. Such contract was made, and was as binding as though made by the legislature itself." (p. 106.)

Upon a petition for a rehearing of this case, the court said: "The City of Detroit made the repeal of the law

providing for the specific tax a ground for claiming the right to ignore the contract in relation to city taxes, and dissensions arose which led to a new arrangement. Thus, in 1887 the Detroit City Railway consented to an adjustment of the controversy by accepting a new ordinance, and this was passed upon in the case of the City of Detroit vs. Detroit City Railway, 76 Mich., 422.

"In 1885 the same thing had been done in the case of the Grand River Street Railway, and the tax has since been paid upon the basis of that arrangement. Now the city is again insisting upon a right to ignore its contract and increase the tax upon the property. We passed upon the question in our original opinion, but counsel ask a rehearing upon the ground that we overlooked the fact that the ordinance of 1887, relating to the Detroit Citizens' Railway, and that of 1885, relating to the Grand River Railway, are not identical in terms. Both had contract rights that were invulnerable under their original franchises. Both undertook to adjust contract rights by accepting new ordinances making new contracts, which this court in the case cited held might be done.

"The City of Detroit had granted contract rights which it disputed, and a compromise was made and new contract rights were created. The effect of counsel's contention is that, notwithstanding this new arrangement and the controversies that the parties sought to settle by it, the new contract really settled nothing and left the council the right to increase the tax at will by a new ordinance which might take effect as soon as the same could be adopted." 86 N. W., p. 809.

In Coy vs. Detroit & Ann Arbor Railway, 85 Nth. Wn. R., pp. 6, 8, the Supreme Court of Michigan, in determining the fare the railway company were authorized to charge, say: "If the Village of Wayne had authority to make a contract with the defendant (which does not seem to be questioned and which for the purposes of this case we take to be conceded), we know of no reason why it might not contract for a cent and a half rate the entire length of its line, and if it did so, any member of the public might claim the benefit of that rate."

V.

Under the statutory and municipal legislation when the complainant company was incorporated, and purchased the rights of the grantor companies in 1891, which was still in force in 1899, the City of Detroit had no power to regulate fares—they could be established only by agreement between the city and the company.

Much space in the brief of the Corporation Counsel for the defendants is devoted to the discussion of the proposition that the "Common Council of the City of Detroit possessed no authority to pass the various ordinances under which the complainant is operating its road except such as was conferred upon it by express" (or necessarily implied) "grant of the legislature of the State of Michigan." (Brief of Mr. Tarsney, pp. 8 to 37.)

It has been so held in express terms by the Supreme Court of Michigan in Street Railway Company vs. Detroit, 110 Mich., 390; and by this Court in Detroit Citizens' Street Railway Co. vs. Detroit Railway, 171 U. S., 48.

With this general proposition, we make no contention; but as a logical and necessary consequence it follows that the city had no power to adopt the ordinances of 1899, regulating the fares on street railways, unless "the same had been conferred upon it by the legislature, either in express terms or by necessary implication."

The case shows conclusively that the only power which the city had over the subject of street car fares in 1899, or has had since 1867, was the right, delegated in Section 20, "to establish the rates of fare *by agreement with the street railway company.*"

The sections preceding this one expressly reserve the power of the city to prescribe and regulate the manner of laying the tracks in the street; the kind of rails to be used; the grades at which the track shall be laid from time to time, and generally all matters affecting the public welfare and safety. Over all subjects which may be comprehended under the "police power" the statute reserves the city's right of regulation (in subordination, however, to the provisions of the Federal Constitution—(Lake Shore Railway vs. Smith, *ubi sup.*), but the subject of fares is left to an agreement between the company and the city.

The separation of these matters in such close apposition emphasizes the express words of the statute, and leaves no doubt whatever of the intention of the legislature.

It was intimated by counsel for the city, in the argument at the Circuit, that the words "and shall not be increased without the consent of such authorities," provide for an agreement on the part of the railway companies, but not on the part of the city.There is no merit in this contention.

An agreement is a meeting of minds. An agreement must be mutual. A prescribing or ordaining rates of fares, a fixing of rates of fares as an act of governmental power, is totally different. When the statute declares that as to all subjects which concern the public welfare and the safety of life and limb on the public streets, as well as passengers on the cars, the city shall have power to prescribe conditions and regulations, it refers to and defines the governmental powers of the city, and when, in the following sections, it declares that the rates of fare shall be established by agreement with the company, it makes them entirely a matter of contract.

There either is or is not an agreement. There cannot be in law an agreement which binds one party and does not bind another.

Since the amendments of 1867 to the Tram Railway Act and the Street Railway Act of the same year—for over thirty years—the City of Detroit and every municipality in Michigan treating with a street car company and every street car company, has construed the statute to make rates of fare a matter of agreement between the city and the company.

Every ordinance of the City of Detroit enacted since 1867 has in express terms required the consent of the company to the ordinance to be in writing. And upon the faith of this mutual construction of the statute and the ordinances, enormous sums of money have been borrowed by the street railway companies upon negotiable bonds and expended upon repairs, betterments and extensions of their lines of railroad.

VI.

Both the language of the statute directing the establishing of rates of fare by agreement between the city and the company and the language in the various ordinances describing the rates of fare are wholly unambiguous and unequivocal.

It scarcely seems necessary to elaborate this proposition.

The statute expressly says: "All rates of toll or fare * * shall be established by agreement between such companies and the corporate authorities of the city or village where the road is located and shall not be increased without the consent of such authorities."

The ordinances, to each of which the city required and obtained the consent of the street railway companies in writing expressly specified. "A single fare of five cents," or a "fare not exceeding five cents."

In the one case the exact fare is fixed, in the other the maximum fare is fixed.

VII.

The third and fourth subdivisions of the brief of counsel for the city contend "that franchises are always granted subject to the police power and that that power cannot be delegated or bargained away, nor can a municipal corporation hamper itself in its exercise."

It is a sufficient reply:

That the exercise by the city of the police power must be in subordination to the provisions of the Federal Constitution.

> Lake Shore R. R. vs. Smith, 173 U. S., 684, 689, 690.

Moreover, the subject matter of these ordinances, prescribing reduced fares to the purchasers of a certain number of tickets and giving additional transfer rides on tickets, is not within the police power.

As we think, we have clearly shown the power of the city in respect to fares after 1867 was limited to agreement with the company as to rates of fare. It is expressly so limited in the Street Railway Act and the

necessary implication of Sec. 34, Tram Railway law, is that the ordinances are to be contractual as respects fares. The city consents to the use of its streets upon certain terms and conditions which it proposes, but this "consent" does not become effective until the company shall have accepted the terms and conditions, and after such acceptance they are irrevocable. If these terms and conditions were intended by the legislature to be made in the exercise of governmental powers of regulation, why does the statute require the consent in writing of the company to them? Why do they so expressly provide that after the street car company has accepted the grant "the city shall not revoke such consent nor deprive the company of the rights and privileges so conferred?"

The Walla Walla case, 172 U. S., p. 2, 15, 17, holds:

"The police power is one which remains constantly under the control of the legislative authority and a city council can neither bind itself nor its successors to contracts prejudicial to the peace, good order, health and morals of the inhabitants, but it is to cases of this class that these rulings have been confined. But where a contract for a supply of water is innocuous in itself and is carried out with due regard to the good order of the city and the health of its inhabitants, the aid of the police power could not be involved to abrogate or impair it" (p. 17).

Under this express delegation of power from the State, in the street railway act and that necessarily implied in Sec. 34, Tram Railway Act, the limitation of the rates of fare by the city was a legitimate matter of contract and does not fall within the class of rights which the city may not bind itself from exercising.

These are such rights only as are public or governmental in their nature and are essential only to the protection of the health, safety and welfare of the citizen and the public convenience.

Cooley's Constitutional Limitations, p. 577.
Beach on Public Corporations, § 1248.
People vs. Jackson Plank Road Co., 9 Mich., 306.
Grand Rapids Railways, 43 Mich., 433.
Lake Shore Railway Co. vs. Ohio, 173 U. S., 285, 305.
Baltimore vs. Baltimore Trust Co., 166 U. S., 673.
City of Detroit vs. Railway Co., 95 Mich., 456.

A regulation designed to affect the city or the inhabitants in a financial way does not come within this class of powers.

City of Newport vs. Bridge Co., 8 L. R. A., 484.
City of St. Louis vs. Telephone Co., 96 Mo., 623.

In City of Newport vs. Newport Bridge Company, 8 L. R. A., the ordinance required the bridge company to issue one hundred tickets for $1.00. The bridge company did not issue such tickets, but in lieu thereof sold five cards, each good for twenty-five crossings, for $1.00. The city sought to enforce a literal compliance with the ordinance by a penal ordinance; held, that the enforcement of the ordinance would not be "an exercise of the police power," the Court saying: "While it is difficult, if not impossible, to concisely define the extent of this power, yet it certainly should not be extended so far as to permit a city to enforce its views of its contracts by penal ordinances in cases involving neither the morals, health nor safety of its people. The public welfare demands the existence of such a power and, when properly directed, the municipality should not be restricted to a narrow limit in its exercise. But when it is a matter of contract affecting merely the pockets of its citzens, or it financially, it must resort to the courts for relief in the same manner as individuals."

In City of St. Louis vs. Bell Telephone Company, 96 Mo., 623, it was held that while the State had the power to fix telephone rates and might delegate it to cities, it had not done so, either in the powers granted to regulate the use of its streets or under the "general welfare clause," "to pass all such ordinances not inconsistent with the provisions of this charter or the laws of the State as may be expedient in maintaining the peace, good government, health and welfare of the city, its trade, commerce and manufactures." The counsel for the city quotes freely and at length from many authorities, many of which give no support to his claims under the facts in this case and some of which are contrary to the great weight of authority both in the Federal and State decisions, such as the doctrine from Laurel Fork and Sand Hill R. R. Co. vs. West Virginia Transportation Co., 25 West Va., 324, quoted in paragraphs 4 and 5 on page 75 of brief of counsel—which is in direct conflict with Wabash Railroad Co. vs. Defiance, 167 U. S., 88, and other decisions of this Court cited in his brief.

Georgia R. R. & Banking Co. vs. Smith, 128 U. S., 174, is copiously quoted from by him, including that portion of

the opinion which expressly declares "that if the charter in this way (by contract embodied in its terms or necessarily implied by them) provides that the charges which the company may make for its services * * * shall be subject only to its own control up to the limit designated, exemption from legislative interference within that limit will be maintained."

In that case the State of Georgia had granted a charter to a railroad company, which contended that the sense of the charter was to give the railroad company the right to charge certain freight rates. Subsequently the Legislature passed a law creating a board with authority to fix rates for common carriers. That board prescribed lower rates than those claimed by the railroad company under the charter. The Supreme Court ruled that the charter was a contract which the subsequent act could not alter; but, upon examination of its provisions, held that the words of the charter did not have the meaning contended for by the railroad company.

The case of City of Indianapolis vs. Navin, 41 L. R. A., 337, differs materially from the case at bar. In it there was no contract between the State or the city and the street railway company as to any fixed rates of fare. A section of the statute provided "that the directors of such street railway companies shall have power to make by-laws * * * for regulating * * * the fare * * * of said road or roads."

Subsequently the Legislature re-enacted this section with a proviso that "in cities in the State having a population of 100,000 or more, according to the census of 1890, the cash fare shall not exceed three cents for any one trip or passage upon the street railroad or roads."

Held, that the city was not authorized to enter into any contract which would prevent the Legislature from legislating on the subject of fares; "that in order to exempt a common carrier from legislative control or its rates of fare, it must appear that the exemption was made in its charter by clear and unmistakable language inconsistent with the exercise of such power by the Legislature;" also that, irrespective of the right reserved in the statute to alter, amend or repeal the street railway act, the State had the general power to regulate fares.

This decision was dissented from by the United States Circuit Court for the District of Indiana, and the amending act held void by Showalter, J., in Central Trust Company vs. Citizens' Street Railway Company, 80 Fed. R., 218, reaffirmed in the same case after the decision of the State Court, 82 Fed. R., 1. The case was appealed and a

motion to dismiss the appeal was denied by the U. S. Circuit Court of Appeals for the Seventh Circuit. In the course of the opinion by Woods, C. J., it is said, referring to City Railway Company vs. Citizens' Street Railroad Company:

> "In view of this utterance, the soundness of which it is not for us to question, it cannot be said to be clear that the company is not right in contending that it has a vested right to charge a five-cent fare until the original period of thirty years and the additional period of seven years given by a later ordinance which the Supreme Court declared valid shall have expired."

On page 21 of the brief of the Corporation Counsel it is said: "It strikes me that the question involved in this controversy is settled in favor of appellants by the decision of this court in Freeport Water Company vs. City of Freeport, 21 Sup. Ct. Rep., 493."

The case at bar is clearly distinguishable from that case, which is officially reported in 180 U. S., 587. The opinion of the majority of the court by Mr. Justice McKenna expressly excepts from its conclusions and dissents from the claim that municipal corporations could not be invested with the power to bind themselves by an irrevocable contract not to regulate water rates. Citing Los Angeles vs. Los Angeles City Water Company, 177 U. S., p. 558, and Walla Walla vs. Walla Walla Water Company, 172 U. S., pp. 1, 7.

The case turned on the interpretation to be given the language of the statute conferring the powers upon the city with respect to water supply, and the section of the general incorporation act reserving to the general assembly "at all times" power to prescribe "such regulations and provisions as it may deem advisable, which regulations shall be binding on any and all corporations formed under the provisions of this act."

The reasoning of the opinion has no application to the case at bar.

1st. The statute of Illinois, April 10, 1872, which was in force July 1st, 1872, when the original ordinance was granted by Freeport city, expressly conferred upon the city the right to "fix the water rates by ordinance." And the court held this to mean a continuing power which the Legislature had not authorized the city to bargain away.

But in the case at bar there was

(a) No power in the City of Detroit in 1899 to "fix street railway fares." They could only "be established by agreement with the company." And

(b) The city had no power to revoke its previous consent or to deprive the company of the rights and privileges so conferred; but, on the contrary, it was expressly prohibited by the Michigan statute from so doing.

2nd. There is no statute of Michigan reserving to the Legislature any such broad powers of regulation of private corporations as are contained in the California statute, and, as we have seen, the reservation of the right to repeal, alter or amend contained in the statute was not delegated to the city.

In this connection we briefly call the attention of the Court to a material distinction between ordinances of cities for the supply of water or light, which are at all times necessary to all the citizens, and ordinances with reference to rates of fare on street railways which only directly concern the citizen when he becomes a passenger thereon.

These considerations and adjudications also dispose of the claim of the city's right to pass the ordinances in question under Section 19 of the ordinance of 1862 (Record, p. 30), reserving to the city "the right to make such further rules, orders and regulations as may from time to time be deemed necessary to protect the interest, safety, welfare or accommodation of the public in relation to said railways."

VIII.

The reservation by the Legislature of the right to alter, amend or repeal, was not delegated to the city.

In the 5th subdivision of the brief of the corporation counsel it is claimed and argued at considerable length "that the regulation of fares in the ordinances in question may be supported by the reserve power of alteration, amendment or repeal contained in the constitution and State of Michigan."

This claim is conclusively denied by the decision of this court upon a similar state of facts in City Railway Co. vs. Citizens' Railroad Co., 166 U. S., 557, 563.

IX.

It is claimed by the city's counsel that because the amending ordinances of 1879, 1880 and 1885, which extended the original terms of the companies' rights in the streets, did not "re-enact and publish at length the orig inal ordinances, they are void."

It is difficult to treat this claim with respectful consideration.

In the language of this court in a similar case, in 166 U. S., p. 569:

> "In view of the large expenditures incurred by the company upon the faith of this ordinance, it is ill-becoming the city to set up its own want of power to make it."

As we have shown, more than eight millions of dollars have been borrowed by the company and expended on its property since 1879 upon the faith of the validity of these extension ordinances. The city has repeatedly recognized and affirmed them by amendatory ordinances imposing new obligations and liabilities upon the railway companies.

The very ordinances in question in this suit are drawn as amendments to these original ordinances.

Finally the amending ordinances fully complied with the charter provision in that they published and re-enacted the sections of the ordinances altered or amended.

The ordinance of 1862 provided as to the Detroit City Railway:

> "Section 20. The powers and privileges conferred by the provisions of this ordinance shall be limited to thirty years from and after the date of its passage." (Record, p. 30, foot.)

The extension ordinance of 1879, after repealing certain ordinances and requiring certain extensions of track and changes in basis of taxation, provided:

> "Section 5. The powers and privileges conferred and obligations imposed on the Detroit City Rail-

way by the ordinance passed November, 1862, and the amendments thereto, are hereby extended and limited for thirty years from date." * * * (Record, p. 36.)

Similar ordinances extended the terms of the original grants to the Fort Wayne & Elmwood Street Railway Company and the Grand River Street Railway Company. (Record, pp. 58, 74.)

We respectfully submit that the decree of the court below was correct and just, and ask that it be affirmed.

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Of Counsel.

APPENDIX.

AMENDMENTS TO MICHIGAN TRAM RAILWAY ACT.

Howell's (Mich.) Annotated Statutes, Vol. 1, p. 906, et seq.

§3525. Section 31. "The Legislature may at any time alter, amend or repeal this act, but such alteration, amendment or repeal shall not operate as an alteration or amendment of the corporate rights of companies formed under it, unless specially named in the act so altering or amending this act, nor shall the dissolution of any such company take away or impair any remedy given for or against such corporation, its stockholders or officers for any liability which shall have been previously incurred."

§3526. Sec. 33. "It shall be competent for parties to organize companies under this act to construct and operate railways in and through the streets of any town or city in this State." Added 1861.

§3527. Sec. 34. "All companies or corporations formed for such purposes shall have the exclusive right to use and operate any street railways constructed, owned or held by them: Provided, that no such company or corporation shall be authorized to construct a railway under this act through the streets of any town or city without the consent of the municipal authorities of such town or city, and under such regulations and upon such terms and conditions as said authorities may from time to time prescribe." Added 1861.

In 1867 the last section was amended by adding a second proviso as follows:

"Provided further, that after such consent shall have been given and accepted by the company or corporation to which the same is granted, such authorities shall make no regulations or conditions whereby the rights or franchises so granted shall be destroyed or unreasonably impaired, or such company or corporation be deprived of the right of constructing, maintaining and operating such rail-

way in the street in such consent or grant named, pursuant to the terms thereof."

§3529. Sec. 36. "In the articles of association of any company formed for the construction and operating of a street railway in any city, it shall be a sufficient designation of the route or routes thereof to declare that said railway is to be constructed and maintained in such streets or public ways of the particular city as has been or shall thereafter from time to time be granted to said company for that purpose by the proper municipal authorities of such city; and it shall be lawful to build, maintain or extend the railway of such company according to the terms or conditions of such grant or grants. Any such company heretofore organized may amend its articles of association to conform to this section, in the manner hereinafter provided for amendments." Added 1867.

§3535. Sec. 42. "All the provisions of this act, as amended, shall be applicable to all corporations now organized under this act, as though specially named." Added 1871.

"SECTIONS OF STREET RAILWAY ACT MATERIAL TO THIS CASE."

Howell's Annotated Statutes, Vol. 1, p. 908, et seq.

§3548. Sec. 13. "Any street railway corporation organized under the provisions of this act may, with the consent of the corporate authorities of any city or village, given in an ordinance or ordinances duly enacted for that purpose, and under such rules, regulations and conditions as in and by such ordinance or ordinances shall be prescribed, construct, use, maintain and own a street railway for the transportation of passengers in and upon the lines of such streets and ways in said city or village as shall be designated and granted from time to time for that purpose, in the ordinance or ordinances granting such consent; but no such railway company shall construct any railway in the streets of any city or village until the company shall have accepted in writing the terms and conditions upon which they are permitted to use said streets; and any such company may extend, construct, use and maintain their road in

and along the streets or highways of any township adjacent to said city or village upon such terms and conditions as may be agreed upon by the company and the township board of the township, which agreement and the acceptance by the company of the terms thereof shall be recorded by the township clerk in the records of his township."

§3549. Sec. 14. "After any city, village or township shall have consented, as in the act provided, to the construction and maintenance of any street railways therein, or granted any rights and privileges to any such company, and such consent and grant have been accepted by the company, such township, city or village shall not revoke such consent, nor deprive the company of the rights and privileges so conferred."

§3550. Sec. 15. "Any street railway company may also purchase and acquire, either at public or at private sale, whether judicial or otherwise, or may hire any street railway in any city, village or township, owned by any other corporation or company, together with all the real and personal estate belonging thereto, and the rights, privileges and franchises thereof, and may use, maintain and complete such road and may use and enjoy the rights, privileges and franchises of such company, the same and upon the same terms as the company whose road and franchises were so acquired might have done. Every street railway company may also purchase, hold, own or take upon lease such real estate, barns, stables, buildings, fixtures and property as may be necessary for the use and business of their road; and the whole or any part thereof, together with their railway, fixtures, property and appurtenances, rights, privileges and franchises, may sell, lease, dispose of, pledge or mortgage, whenever the corporation shall deem it expedient so to do."

§3555. Sec. 20. "The rates of toll or fare which any street railway company may charge for the transportations of persons or passengers over their road, shall be established by agreement with such company and the corporate authorities of the city or village where the road is located, and shall not be increased without consent of such authorities."

§3564. Sec. 29. "All companies and corporations heretofore organized in this State for the purpose of

building and operating street railways under the statutes then in force, shall have the same powers, rights, protection and privileges, and shall be subject to all the liabilities as are hereby provided for companies and corporations organized under the provisions of this act."

§3565. Sec. 30. "All companies and corporations hereafter formed for the purpose of constructing, owning or using any street railway for the transportation of persons or passengers, in any city or village, shall be organized under the provisions of this act, and shall be subject to the provisions of chapter seventy-three, of the Compiled Laws of this State, and to all general laws of this State, relating to corporations, so far as the same may be applicable to corporations formed under this act, and the legislature may alter and amend, or repeal this act at any time."

Office Supreme Court U.S.
FILED
OCT 14 1901
JAMES H. MCKENNEY
Clerk.

By. of Brennan & Donnelly for Appellee.

SUPREME COURT OF THE UNITED STATES.

Filed Oct. 14, 1901.

THE CITY OF DETROIT,
WILLIAM C. MAYBURY, Mayor,
CHARLES FLOWERS, Corporation Counsel,
Defendants and Appellants,

vs.

THE DETROIT CITIZENS' STREET RAILWAY COMPANY,
Complainant and Appellee.

Appeal from the Circuit Court of the United States for the Eastern District of Michigan. In Equity.

OCTOBER TERM, 1901.

No. 152.

BRIEF OF M. BRENNAN AND JOHN C. DONNELLY FOR APPELLEE.

DETROIT:
Record Printing Co., Free Press Bldg., 11 and 13 Lafayette Ave.
1901.

IN THE

SUPREME COURT OF THE UNITED STATES.

THE CITY OF DETROIT,
WILLIAM C. MAYBURY, Mayor,
CHARLES FLOWERS, Corporation Counsel,
Defendants and Appellants,

vs.

THE DETROIT CITIZENS' STREET RAILWAY COMPANY,
Complainant and Appellee.

BRIEF OF M. BRENNAN AND JOHN C. DONNELLY FOR APPELLEE.

From 1862 to August, 1899, the complainant and its assignors exercised, unquestioned, the right to charge a five cents fare for the carriage of passengers on its street railway lines in Detroit in accordance with the terms of various original and supplementary contracts entered into between the assignors of complainant and the City of Detroit, all of which are hereinafter more fully set forth. This right to charge five cents also contained the important qualification that certain of the lines owned and operated by complainant were, by the various ordinances and contracts referred to, designated as independent routes over each of which it was entitled to charge the full fare of five cents. Its lines were not all acquired from the same grantor company, nor was the right to construct and operate all of the lines which it owned granted, in the first instance, to the same company, or under the same ordinance. In addition thereto, in the original grant, certain routes were laid out and designated, over each of which the complainant and its assignors were entitled to charge the full fare of five cents, and a passenger taking passage on any one of these routes, or upon any one

of the independent lines acquired from other companies, if he desired to travel beyond that route or line and upon some other route or line, he could only do so upon the payment of a second fare, except as modified as hereinafter set forth by supplemental agreement between the city and the company.

In August, 1899, the City of Detroit, through its Common Council and Mayor, acting in their legislative capacity, and without the consent of the company, adopted certain ordinances which are fully set forth in the bill of complaint, by which it was undertaken to compel the complainant to carry passengers at a rate of fare of eight rides for 25 cents, and abolishing the distinction as to routes and lines, and to compel the company, at the reduced rate of fare, to give universal transfers, so-called. These attempts to reduce the rates of fare and compel transfers were not in the form of conditions attached to any new grants or consents from the city to the company then made, but were wholly independent legislative enactments, compulsory in their character, and were assumed to be enacted by the city by virtue of authority from the State, and as the representatives of the State.

This case, therefore, involves the question of the power of the Common Council of the City of Detroit, in its legislative capacity, to abrogate the existing agreements and reduce the rates of fare for the carriage of passengers by the street car company, without the consent of the company.

A clear understanding of the case thus presented can be obtained by first setting forth briefly the provisions of the various ordinance contracts which were from time to time entered into between the City of Detroit and the appellee and its grantors touching the question of the rates of fare, supplemented by a statement of the provisions of the Michigan statutes touching the question of the authority of the city to deal with the subject matter of the rates of fare to be charged by street railroad companies.

ORDINANCE CONTRACTS.

By the terms of a grant made by an ordinance approved November 24th, 1862, the Detroit City Railway obtained the right to construct, maintain and operate street railways through Jefferson, Michigan, Woodward, Gratiot and Grand River avenues; and Witherell, Brush or Beaubien, Fort street west, Third street and some other minor streets in the City of Detroit for the carriage of passengers. (Record, 27-35.)

Section 8 of the grant provided as follows:

> "The rate of fare for any distance shall not exceed five cents in any one car or on any route named in this ordinance except where cars or carriages shall be chartered for specific purposes: Provided cars so chartered shall not be considered regular cars within the meaning of the preceding section." (Rec., 29.)

The routes referred to in the foregoing section were fixed by Section 5 of the grant, which reads as follows:

> "The routes of all said railways shall commence in the Woodward avenue road at Campus Martius, from thence running on their several courses to the outer limits of the city: Provided, that in collecting fare those portions between Atwater, through Brush or Beaubien streets and through Woodward avenue to Jefferson avenue, and between Brush and Beaubien or Third streets and Jefferson avenue and Woodbridge street shall be respectively deemed to belong to either of the above routes, any portion of which is then being traveled continuously by any one passenger at the same time shall pay only one fare."

It will thus be seen that the lines on Jefferson, Gratiot, Woodward, Michigan, those being the only ones built under that grant, were each fixed by Section 5 as separate and distinct routes, on each of which the company was entitled to charge a single fare for the carriage of a passenger; and a passenger paying such fare was not entitled to a transfer ticket by which he could ride free of charge over any other route than the one on which he had taken passage. These provisions remained without modification or change until 1889, when certain changes were agreed to by the company and the city which will be hereinafter referred to.

By the terms of the grant of 1862 the powers and privileges conferred by the grant were assumed to be limited to thirty years from and after the date of the grant (Section 20). From time to time thereafter prior to 1879 the company was authorized to extend its tracks and to change to double tracks on several of its routes, all subject to the provisions of the original grant in so far as they applied.

On November 14th, 1879, as the result of negotiations between the city and the company having for their objects the readjustment of the fiscal relations between the city and the company and the continuation of the original grants, an agreement (Record, 35) in the form of an ordinance was entered into by which the various rights and privileges theretofore granted to the company were extended for a period of thirty years from that date by the following provision:

> "Section 5. The powers and privileges conferred and obligations imposed on the Detroit City Railway Company by the ordinance of November 24th, 1862, and the amendments thereto are hereby extended and limited to thirty years from this date." (Record, 36.)

It appears that prior to this time, under the terms of two grants, one to the Detroit and Grand Trunk Junction Street Railway Company; and the other to the Central Market, Cass Avenue and Third Street Railway Company, street railways had been built and were on November 14th, 1879, in operation on certain other streets than those on which the Detroit City Railway was maintaining and operating street railways, and those other lines having been acquired by that company, it was agreed in the contract of November 14th, 1879, that the grants to the two companies mentioned should be cancelled and that thereafter those lines should be operated under the provisions of the grant to the Detroit City Railway.

After 1879, down to and including January 3rd, 1889, various additional grants of new routes were made by the city to the company, notably Trumbull avenue and Brush street, and also various extensions of other routes, all of which were subject to the provisions of the original grant as extended by the contract of November 14th, 1879. (Record, pp. 36-44.)

On the 3rd January, 1889, the city granted to the company the right to construct and maintain a route on Congress street east to Brush, on Brush to Fort street east; thence on Fort street east to Mt. Elliott avenue and Jefferson avenue to the easterly limits of the city; also on Cass avenue from Ledyard northerly to the Detroit and Bay City crossing; and also to extend its double track on Jefferson avenue to the easterly city limits, which at that time had been extended considerably east of the point at which it was when the former grants were made. Also to double its track on Gratiot avenue to the new easterly

city limits; and on Mack street from Gratiot to the easterly city limits; also to connect Michigan avenue and Gratiot avenue lines so as to make them one route. (Record, 44-47.)

Section four of this grant provided as follows:

"Section 4. The above mentioned additional lines shall be operated in conection with and as part of the present system of the Detroit City Railway, but the permission and authority hereby given shall be inoperative and void unless the said Detroit City Railway shall file a written acceptance thereof within thirty days from the date of the passage of this ordinance, in which the said company shall agree to do and perform the following with reference thereto, to-wit:

"a. It shall carry passengers from its Cass Avenue and Third Street, Trumbull Avenue, Michigan Avenue and Congress and Baker Street lines to any point on the proposed line on Fort street east or to the easterly terminus thereof for a single fare of five cents for one continuous trip, and from the easterly terminus of the proposed line on Fort street east, or from any point thereon to any point on Congress and Baker Streets, Michigan Avenue, Trumbull Avenue and Cass Avenue and Third Street lines for a single fare of five cents for one continuous trip.

"A passenger paying a single fare of five cents on the line hereby authorized to be constructed on Joseph Campau, Atwater and Chene streets shall be entitled to be transferred at Fort street to and conveyed by cars run on the proposed line on Fort street east to any point on said Fort street line in one continuous trip, or to be transferred at Gratiot avenue to the line on said Gratiot avenue to be carried to any point of said Gratiot and Michigan Avenue lines in one continuous trip. A passenger paying a single fare of five cents on the line hereby authorized to be constructed on Fort street east shall be transferred at Chene street to the said Chene Street line and carried to any point thereon in one continuous trip. A passenger paying a single fare of five cents on the Gratiot Avenue line shall be entitled to be transferred at Chene street to said Chene Street line and to be carried to any point therein in one continuous trip.

"b. A passenger paying a single fare of five cents on the Gratiot Avenue line shall be entitled to a continuous ride from said Gratiot Avenue line and proposed lines on Chene street, and Fort street to the Belle Isle Bridge, and from the Belle Isle Bridge in a reverse direction over the Fort Street, Chene Street and Gratiot Avenue lines for a single fare of five cents for one continuous trip."

"c. It shall arrange for and carry out an interchange of traffic of the Michigan and Gratiot Avenue lines either by transfer of passengers or by running other cars so that passengers will be carried from any point on either of said routes to any point on the other for a single fare of five cents for one continuous trip.

"d. Such arrangement shall be made by said company that within two months after this ordinance shall have been accepted by said company it shall carry such passengers as shall have taken passage on the cars between the hours of 5:30 o'clock and 7 o'clock in the morning, and between the hours of 5:15 o'clock and 6:15 o'clock in the afternoon over any of its lines in said city for a single fare to be paid for by a ticket sold at the rate of eight tickets for twenty-five cents for one continuous trip with all the rights of transfer and through carriage provided for in paragraphs a, b and c in this section." (Rec., 46-47.)

It clearly appears from these provisions that the city and the company then understood that the fare could only be reduced and transfers obtained by the consent of the company, and that the city could not by independent adverse action compel such reduction or the granting of such transfers. It will be noted this contract definitely declares the fare to be five cents.

No further changes were made in the relations between the city and the company so far as the lines constructed under the grants hereinbefore recited were concerned. The Detroit City Railway continued to maintain and operate the various lines constructed by it under the various grants until 1890, when it conveyed all of them, with the rights and franchises attached thereto, to the Detroit Street Railway Company, which in turn in 1891 conveyed the same to the complainant in this case.

GRAND RIVER RAILWAY.

On May 1st, 1868, the city granted to the Grand River Street Railway the right to construct and operate a line of railway on Woodward avenue, from Jefferson to Grand River avenue and thence on Grand River avenue to the Michigan, Southern and Detroit, Monroe and Toledo Railway tracks.

By Section 6 of the grant it was provided as follows:

> "The rate of fare for any distance shall not exceed five cents in any one car or on any one route named in this ordinance except where cars or carriages shall be chartered for specific purposes; provided, cars so chartered shall not be considered regular cars within the meaning of the preceding section." (Record, 52-57.)

The railway authorized by this grant was constructed by the grantee and put in operation.

By section 19 of the grant, the powers and privileges conferred thereby were apparently limited to thirty years from the date of the grant.

By a grant dated June 27th, 1885, the Grand River Street Railway was authorized to construct an additional street railway in the following terms:

> "Section 1. Subject to all and every of the provisions, regulations and requirements of Chapter 52 of the Revised Ordinances of the City of Detroit for 1878 and the amendments thereof (Chap. 52 is the original Grand River Street Railway grant just referred to), consent, permission and authority are hereby given to the Grand River Street Railway Company to lay, construct, use and operate a single street railway track, with suitable switches, turnouts and turn-tables, on and through Myrtle street in the City of Detroit and the same to keep and maintain and operate thereon street railway cars in the manner and subject to the conditions herein contained, and to all the requirements and conditions set forth in said ordinance and the amendments thereto, to wit, connecting with and joining Grand River Street Railway Company track at the inter-

section of Myrtle street and Grand River avenue and running thence westerly on and through Myrtle street to Mt. Hope avenue."

"Section 2. The said company shall run through cars on the route described from the westerly terminus on Myrtle street to the intersection of Woodward and Jefferson avenues, and the rate of fare over such route shall be five cents." (Record, 57.)

By a grant approved January 3rd, 1889 (Record, 59), the Grand River Street Railway was authorized to construct a street railway through Grand River avenue; also a single track railway on Crawford street from Grand River northerly to the Detroit & Bay City crossing; also through Congress street east to the easterly limits of the city; and thence over the tracks of the Detroit City Railway along Mt. Elliott and Jefferson avenue to the Boulevard.

The lines thus authorized were to be operated as part of the existing system of lines of the Grand River Street Railway.

Section 3 provided as follows:

"The lines hereby authorized to be constructed on Crawford street and Congress street east shall be operated in connection with the present Grand River Street Railway lines, and as a consideration for the permission hereby granted the said company shall, when filing its acceptance of this ordinance as hereinafter required, file a stipulation or agreement in writing by the terms of which it shall agree to carry passengers from the westerly termini of its lines on Myrtle street and Grand River avenues to the northerly terminus of its line on Crawford street or any point on any of its said lines to any point on its line on Congress street east or to the terminus thereof for a single fare of five cents for one continuous trip, and from any point on its line on Congress street east in a westerly direction to any point on any of its said lines on Grand River, Myrtle or Crawford streets; also for a continuous trip from any point on the lines of its said railway to any other point on the lines of said railway for a single fare of five cents for one continuous trip; and shall also within sixty days of the date of the acceptance of this ordinance issue and sell tickets at the rate of eight for twenty-five cents, said tickets to be good

> for transportation over the entire route of said company or any portion thereof traveling continuously either way when offered for fare by persons taking passage on the cars between the hours of 5:30 o'clock and 7 o'clock in the morning, and between the hours of 5:15 o'clock and 6:15 o'clock in the afternoon." (Record, 59.)

The Grand River Street Railway continued to operate the various lines of railway until 1890, when it conveyed the same with all the rights pertaining thereto to the Grand River Railway Company, which in turn conveyed the same in 1891 to the complainant.

FORT WAYNE & BELLE ISLE RAILWAY CO.

By a grant approved January 31st, 1865, the City of Detroit granted to the Fort Wayne & Belle Isle Railway Company the right to construct, maintain and operate what was known as the Fort street west and Croghan street line. (Record, 70-74.)

Section 8 of the grant provided as follows:

> "The rate of fare for any distance shall not exceed five cents in any one car on said route except when cars or carriages shall be chartered for specific purposes: Provided, cars so chartered shall be so designated by placards and shall not be considered regular cars within the meaning of the preceding section." (Record, 72.)

By section 20 of the grant the powers and privileges conferred were apparently limited to thirty years from the date of the grant.

By an agreement entered into June 30th, 1880, this agreement was extended for a period of thirty years from that date, such extension being apparently the result of negotiations concerning the fiscal relations between the city and company. (Record, 74.)

By various grants of June 27th, 1885; July 24th, 1886, and December 22nd, 1886, the Fort Wayne & Belle Isle Company was authorized to make certain extensions of the route named and to double track portions of the route. (Record, 75-76-77-78.)

Section 2 of the grant of July 24th, 1886, is as follows:

> "Section 2. The rate of fare for any distance on said Fort Wayne & Elmwood Railway, including the extension authorized by this ordinance, shall not exceed five cents in any one car, except when cars or carriages shall be chartered for any specific purposes: Provided, cars so chartered shall be so designated by placards, and shall not be considered regular cars within the meaning of Section 7, Chapter 99, Revised Ordinances of 1884 of the City of Detroit." (Record, 77.)

By the terms of the agreement made December 22nd, 1886, and subject to the provisions of the existing agreement, the Fort Wayne & Elmwood Railway Company was authorized to construct and maintain additional railway track as a part of its existing system as follows:

> "Commencing at and connecting with the present easterly terminus of the street railway track of said company at the junction of Croghan street and Elmwood avenue, running thence upon and along Elmwood avenue to the intersection of that avenue and Fort street, thence along La Fayette street to a point thereon not less than thirty feet nor more than 100 feet west of the limits of the Boulevard on Frontenac avenue." (Record, 77.)

By section 2 of that grant additional provisions, regulations and requirements were made as to the operation of the lines of the Fort Wayne & Elmwood Railway Company, the third subdivison of the section being as follows:

> "Third. The street railway track heretofore laid and constructed by said company under the provisions of the several ordinances mentioned in section 1; and the street railway tracks authorized to be laid and constructed by this ordinance, when complete shall be deemed one railway, and the route of such railway shall commence at the western terminus thereof at or within the city limits; and from thence running along the line of said railway as heretofore hereby or hereunder established to the Boulevard or Frontenac avenue, and in collecting fare, the whole of said distance shall be deemed one route and each passenger traveling the same continuously either way over the whole or any portion thereof shall pay only one fare, the amount of which shell be five cents." (Record, 77-78.)

By grant approved August 20th, 1888, the Fort Wayne & Belle Isle Railway Company was authorized to extend its track on Champlain street from the Boulevard easterly to the city limits, and section 2 thereof, including the third subdivision thereof, is a literal re-enactment of section 2 of the grant of December 22nd, 1886, just recited. (Record, 80.)

By the terms of a grant approved January 3rd, 1889 (Record, 81), the Fort Wayne & Elmwood Railway Company (being the same company as the Fort Wayne & Belle Isle Railway, the name having been changed) was granted the right to construct and operate a single track road along Champlain street from Randolph street to Elmwood avenue, there connecting with its then existing track, and on Mt. Elliott to Fort street, and in Fort street to Baldwin avenue, and on Baldwin avenue to Champlain; also certain tracks to reach the bridge. The route around and through Cadillac Square to Bates street and Randolph was also changed, the effect and purpose of the grant being to make what had theretofore been a single track route from Woodward avenue easterly along Croghan street, a loop line, operating on Champlain and Croghan streets. This grant was made subject to the terms and provisions of all of the existing grants from the city to the Fort Wayne & Elmwood Railway Company.

As above stated, the name of the Fort Wayne & Elmwood Railway was changed by amendment to that of the Fort Wayne & Belle Isle Railway Company, and that company continued to operate the various lines of railway recited until 1898, when it conveyed the same with all rights relating thereto to the Detroit, Fort Wayne & Belle Isle Railway, which company now owns the same, it having leased the same in March of this year to the complainant in this case; and the same are now being maintained and operated by the complainant.

It is thus, among other things, seen from the recitals of the provisions from time to time agreed upon between the city and the several street railway companies that the language of the clauses relating to rates of fare has been changed to a direct statement that the rate of fare should be five cents.

We think it is quite clear that the provisions stating that the rate of fare should not exceed five cents was an agreement that the company might charge five cents for the carriage of a passenger over any of the routes, but if any doubt existed as to that it has been entirely removed by the changes shown.

RESERVATION IN GRANTS.

Inasmuch as it may be claimed that the action of the defendant in the passage of the ordinances in litigation is permitted by what is known as the reserve clause in the various grants, it may be well to call the attention of the Court specifically to them.

Section 19 of the grant of November 24th, 1862, is as follows:

> "It is hereby reserved to the Common Council of the City of Detroit the right to make such further rules, orders or regulations as may from time to time be deemed necessary to protect the interest, safety, welfare or accommodation of the public in relation to said railways." (Record, 30.)

Section 7 of the grant of November 14th, 1879, re-enacting and extending the grant of November 24th, 1862, is as follows:

> "The right to amend or repeal this ordinance in case of its violation by said company or companies is expressly reserved." (Record, 36.)

Under the Michigan decisions this clause could be acted on only after a judicial determination that the same had been violated.

> F. & F. Plank Rd. Co. vs. Woodhull, 25 Mich., 99.
> Cooley's Constitutional Lim. (4 Ed.), 340.

Section 3 of the grant of January 5th, 1885, authorizing the Brush Street line is as follows:

> "It is hereby reserved to the Common Council of the City of Detroit the right to make such further rules, orders or regulations as may from time to time be deemed by the Common Council necessary to protect the interest, safety, welfare or accommodation of the city and public in relation to said railway." (Record, 39.)

Section 3 of the Trumbull Avenue line grant of July 31st, 1865, is a literal copy of the one last quoted. (Record, 40.)

Section 6 of the grant of January 3d, 1889, authorizing East Fort Street, Chene Street, Cass Avenue, Jefferson

Avenue double track, Gratiot Avenue, Mack Street, and providing for a system of transfers and workingmen's tickets is identical in language with the foregoing quotations. (Record, 47.)

Section 18 of the grant to the Grand River Street Railway of May 1st, 1868, is as follows:

> "It is hereby reserved to the Common Council of the City of Detroit the right to make such further rules, orders or regulations as may from time to time be deemed necessary to protect the interest, welfare or accommodation of the public in relation to said railways." (Record, 56.)

The same reservation was contained in Section 4 of the grant of June 27th, 1885, of the Myrtle Street route. (Record 57.)

Also in Section 3 of the grant extending the line on Grand River of August 3d, 1888. (Record, 59.)

Section 19 of the grant of January 31st, 1865, to the Fort Wayne & Belle Isle Company is as follows:

> "It is hereby reserved to the Common Council of the City of Detroit the right to make such further rules, orders or regulations as may from time to time be deemed necessary to protect the interest, safety, welfare or accommodation of the public in relation to said railways." (Record, 73.)

This clause was not inserted in any other of the Fort Wayne and Belle Isle grants, but all subsequent grants were made subject to the terms of the original grant as amended.

II.

STATUTORY PROVISIONS.

It appears that the Detroit City Railway, the grantee in the original grant of November 24th, 1862, was incorporated under Chapter 94 of Howell's Annotated Statutes, commonly known as the Train Railway Law. (Record, Bill, 3—Answer, 107.) Also that the Fort Wayne & Elmwood Railway Company, the grantee in the original grant of January 31st 1865 was also incorporated under the Train Railway Law; and that the Grand River Street Railway, the grantee in the original grant of May 1st,

1868, was incorporated under the same act (Record, Bill, 6—Answer, 109); and it is but fair to assume that the original grants were made to those several companies by authority of the provisions of the Train Railway Law. The Detroit Street Railway Company, the successor of the Detroit City Railway; the Grand River Railway Company of the Grand River Street Railway, the Detroit, Fort Wayne & Belle Isle Railway and the Detroit Citizens' Street Railway Company, the successor to the two first named companies and the lessee of the last named company was incorporated under the provisions of Chapter 95 of Howell's Annotated Statutes, and commonly known as the Street Railway Act, which was enacted during the legislative session of 1867. As will hereafter appear, it becomes necessary in considering the rights of the complainant to consider the provisions of both of the laws mentioned, and especially those provisions referring to the power of the city to deal with the question of the rates of fare for the carriage of passengers.

a. TRAIN RAILWAY LAW.

As originally enacted, the Train Railway Law had in contemplation only the construction of freight roads over which any persons owning cars fit for operation on such a track or road might operate such cars. The only provision contained therein touching the question of tolls, simply contemplated the erection and maintaining of toll houses somewhat after the method of the ordinary plank road at which the persons owning and operating the cars on the track would be required to pay certain toll. The Act provided the rate of toll which might be collected, which was charged upon the tonage and mileage basis, and the provision in regard thereto can have no application to the toll or rates of fare to be charged for the transportation of passengers on street railways in cars owned by the street railway and operated on the tracks the right to the use of which is vested exclusively in the railway company.

This Act was amended in 1861 by adding therto the following sections:

> "Section 33. It shall be competent for parties to organize companies under this Act to construct and operate railways in and through the streets of any town or city in this State."

> "Section 34. All companies or corporations formed for such purposes shall have the exclusive right to use and operate any street railways constructed, owned or held by them, Provided that no such company or corporation shall be authorized to construct a railway under this act through the streets of any town or city without the consent of the municipal authorities of such town or city, and under such regulations and upon such terms and conditions as said authorities may from time to time prescribe."

In 1867, Section 34 was further amended by adding the additional proviso, as follows:

> "Provided further, that after such consent shall have been given and accepted by the company or corporation to which the same is granted, such authorities shall make no regulations or conditions whereby the rights or franchises granted shall be destroyed or unreasonably impaired, or such company or corporation be deprived of the right of constructing, maintaining and operating such railway in the streets in such consent and grant named pursuant to the terms thereof."

It will be be noted that the last proviso was inserted in the act at the same session and practically simultaneously with the enactment of the Street Railway Law, to which more extended reference will be made.

At the legislative sessions of 1863, 1867 and 1871, several amendments were made to this act, but none have any reference to the matter under discussion. The most of them have distinct reference to freight rates for the incorporation of which the act was originally passed. So far as street railways are concerned, Chapter 94 does not contain any provision touching specially upon the question of the rates of fare for the carriage of passengers, and until 1867 there was no statute in Michigan which specifically bore on that subject. The law remained in this condition until the passage in that year of what we have heretofore styled "The Street Railway Act," which is contained in Chapter 95 of Howell's Annotated Statutes. This Act contains a number of provisions bearing on or pertinent to the matter in controversy here.

b. STREET RAILWAY ACT.

This Act in general terms provides for the incorporation of street railway companies proper. The manner of incorporation and the general provisions with reference thereto do not differ materially from those contained in the numerous incorporation acts to be found on the statute books. The provisions of the act having more direct reference to the question here are as follows:

> "Section 13. Any street railway corporation organized under the provisions of this Act may with the consent of the corporate authorities of any city or village given in and by an ordinance or ordinances duly enacted for that purpose and under such rules, regulations and conditions as in and by such ordinance or ordinances shall be prescribed, construct, use, maintain and own a street railway for the transportation of passengers in and upon the lines of such streets and ways in said city or village as shall be designated and granted from time to time for that purpose in the ordinance or ordinances granting such consent, but no such railway company shall construct any railway in the streets of any city or village until the company shall have accepted in writing the terms and conditions upon which they are permitted to use said streets; and any such company may extend, construct, use and maintain their road in and along the streets or highways of any township adjacent to said city or village upon such terms and conditions as may be agreed upon by the company and the township board of the township, which agreement and the acceptance by the company of the terms thereof shall be recorded by the township clerk in the records of his township.
>
> Any company organized under the provisions of this act, may construct, use, maintain and own a street railway for the transportation of passengers, in and along the streets and highways of any township, upon such terms and conditions as may be agreed upon by the company and the township board of the township, which agreement and the acceptance by the company of the terms thereof, shall be recorded by the township clerk in the records of the township."
>
> "Section 14. After any city, village or township shall have consented as in this act provided to the

construction and maintenance of any street railways therein, or granted any rights and privileges to any such company, and such consent and grant have been accepted by the company, such township, city or village shall not revoke such consent, nor deprive the company of the rights and privileges so conferred."

Section 15 provides that any street railway company may purchase and operate any existing line of road owned by any other corporation or company with all the rights, privileges and franchises thereof, and may use and enjoy the same as though it had originally constructed the same.

"Section 20. The rates of toll or fare which any street railway may charge for the transportation of persons or passengers over their road shall be established by agreement between said company and the corporate authorities of the city or village where the road is located and shall not be increased without the consent of such authorities."

"Section 29. All companies and corporations heretofore organized in this State for the purpose of building and operating street railways under the statutes then in force shall have the same powers, rights, protection and privileges and shall be subject to all of the liabilities as are hereby provided for companies and corporations organized under the provisions of this act."

Section 30 provides that all companies and corporations thereafter formed for street railway purposes must be organized under this act.

It will be noted that when the original grant to the Detroit City Railway was re-enacted and extended on November 14th, 1879, and the original grant to the Fort Wayne & Elmwood Railway Company was re-enacted and extended in 1880, and the original grant to the Grand River Street Railway was re-enacted and extended in 1885, the provisions of the Street Railway Act just quoted were in force and by the express terms thereof the original grantees though incorporated under the Tram Railway Act, became entitled to the benefit and protection of all of the provisions of the Street Railway Act.

The same is true as to all of the subsequent grants made by the city to the various companies named, so that assuming that the contract of November 14th, 1879, operated in law as a re-execution or renewal of the original agreement between the Detroit City Railway and the city

for a period of thirty years from that date; and that the agreement of 1880 between the Fort Wayne Elmwood Avenue Railway and the City of Detroit operated as a re-execution and renewal of the original agreement between them; and that a like agreement made with the Grand River Street Railway operated as a re-execution and renewal of the original agreement between that company and the city, it is quite clear that such re-execution and such renewal were subject to the terms of the Street Railway Act, and those companies thereby became entitled to have those agreements so renewed and re-executed construed and enforced according to the provisions of the Street Railway Act.

Section 15 of the Street Railway Act is as follows:

> "Section 15. Any street railway company may also purchase and acquire at public or private sale, whether judicial or otherwise, or may hire any street railway in any city, village or township owned by any other corporation or company, together with the real and personal estate belonging thereto, and the rights, privileges and franchises thereof, and may use, maintain and complete such road, and may use and enjoy the rights, privileges and franchises of such company and upon the same terms as the company whose road and franchises were so acquired might have been. Every railway company may also purchase, hold, own or take upon lease such real estate, barns, stables, buildings, fixtures as may be necessary for the use and business of their road; and the whole or any part thereof, together with their railway fixtures, property and appurtenances, rights, privileges and franchises, may sell, lease, dispose of, pledge or mortgage whenever the corporation shall deem it expedient so to do."

This section is quoted for the purpose of placing before the Court the status of the complainant as the purchaser and lessee of the various railway lines as set forth in the bill. The acquisition by purchase or leasing and the operation of these lines by the complainant does not change their character, or deprive the complainant of the right to operate them as wholly independent from the ones which it formerly owned. The fact that the complainant at the time of its lease and at the present time owns and operates other street railroads in the city does not entitle the city to treat the Detroit, Fort Wayne & Belle Isle

Railway lines as a part of the original system, and the same condition exists as to the Grand River Railway lines, except that they were acquired by purchase instead of by lease.

III.

The following propositions seem to us correctly to state the law of this controversy and, if sound, dispose of the claim of the defendant that the ordinances in controversy are valid:

1. That the effect of the agreement of November 14th, 1879, between the city and the Detroit City Railway was to re-execute or renew and extend the original contract existing between the parties.

That the agreement of 1880 between the Fort Wayne & Elmwood Company and the city operated as a re-execution and extension of the original contract between those parties.

And that the agreement of 1885 between the Grand River Railway Company and the City of Detroit had the like effect upon the relations between those parties. That so far as the rights of the parties were concerned it is the same as though they had in substance ignored the existence of the original contracts and had simply made new contracts containing the same provisions for the purpose of defining the rights, duties and obligations of the parties from thence forward.

2. That the Street Railway Act, being in force at the time of the making of such new contracts, the provisions thereof apply. and by operation of law became a part of the agreements, and the rights of the parties and their powers and obligations in the making of such contract must be construed with reference to the Street Railway Act.

3. That as matter of general law and in the absence of any statutory provision touching the matter, grants by the city to the company were executed contracts. The relations between the parties established thereby were contractual, in so far as the substantial rights of the company were concerned; and this is especially so with reference to the substantial elements of the right to construct, maintain and operate the road and the right to collect the rate of fare agreed upon for the carriage of passengers

thereon. It is emphatically so under the provisions of our statutes, the Street Railway Act in express terms making the matter of the regulation of the rates of fare a subject for agreement alone between the city and the company; and in express terms removing it from the domain of legislation.

4. The reservations contained in the various ordinances by which the city retains the right to make further rules and regulations were not intended and cannot be construed to have the effect of giving the city the right to interfere with or lessen the substantial rights of the companies, nor can the language be construed as giving to the city, with the consent of the company, the right to treat as a matter of legislation the rate of fare, which by the terms of the Street Railway Law is expressly made a matter of agreement, in the making of which the company is one of the contracting parties.

5. The city does not possess generally the power to regulate rates of fare for the transportation of persons or property, the Legislature not having delegated such power to it.

6. That by the terms of the various agreements the right to charge a fare of five cents was granted to the various companies; it matters not whether the language be that the rate of fare shall not exceed five cents, or that the rate of fare shall be five cents. The right of the company to charge the full maximum rate cannot be taken away by the city under assumed authority from the Legislature. Such right is one resting in contract, and the action of the city in assuming, in its legislative capacity as the representative of the State, to compel the company to accept a less rate of fare and to furnish transfers or free rides on other routes is an impairment of the contract right, and therefore void under the Constitution of the United States.

A. As to the effect of the extending or renewal contracts, the Court is referred to the decision of the Court of Appeals for this Circuit in the case of the City of Detroit vs. Detroit Citizens' Street Railway Company et al., 12 C. C. A., page 368, in which the Court is discussing the grant of November 14th, 1879, hereinbefore referred to. They use the following language:

> "The ordinance of 1879 was not a new grant or a new consent; it was confessedly an extension of the old grant or consent upon the terms and condi-

tions of the old consent, except in so far as those terms were readjusted. It follows that the extension of that term was a grant to the Detroit City Railway Company and its successors and assigns."

B. In support of the second proposition of law above made, namely that the Street Railway Act, being in force at the time of the making of the new contracts in extension of the rights of the company, such Street Railway Act became a part of the charter of the existing tram companies and by operation of law a part of the agreements and the rights of the parties, and their powers and obligations must be measured by the terms of that act. The Court's attention is respectfully called again to the case last above cited. The question under discussion at that time was whether the agreement or extension of November 14th, 1879, was valid, it being claimed by the city that because the term was extended a period of sixteen years beyond the corporate life of the grantee, that the excess sixteen years was void as being beyond the power of the city to make the grant, and of the company to take. The argument for the city was based upon the absence of any provision of the Train Railway Law authorizing such a grant.

After giving the history of the provisions of the Train Railway Act authorizing street railways; and of the Street Railway Act of 1867, and quoting the various provisions that I have heretofore cited, the Court proceeds:

> "That the Street Railway Acts cited heretofore do confer the power, grant and easement, as conceded by the learned counsel for the city. That this power is not expressly limited as to the term for which such grant may be made is also conceded. Their contention is that the power under which any easement may be granted is not an express power, but implied only from the power granted 'to consent to the operation' of the charter franchises; that a power arising only from this power 'to consent' is necessarily limited by the duration of the franchise consented to. This conclusion seems to rest the case upon the assumption that the power of the city to grant any easement is found alone in the Train Railway Act and to exclude from consideration in construing that act the peculiar constitutional policy of the State limiting the legislative power in the matter of direct interference with the

> purely local concerns of the cities and chartered villages of the State. It also excludes from consideration the general charter powers of the City of Detroit over its streets. It fails to read in connection with the Train Railway Act the more elaborate Street Railway Act passed in 1867 and in full force and effect when the extension of the ordinance was passed, and attaches little importance to the general principles the Legislature had in view when it undertook to provide for the establishment of street railway companies. Any conclusion drawn alone from an artificial construction of the Train Railway Act and which ignores in so large a degree the primary canon of construction which requires that effect shall be given to the intent of the law making power, and that that intent shall be ascertained in every legitimate way must bring about an unsatisfactory result."

On page 275, referring to the Train Railway Act and the Street Railway Act the Court says:

> "These two acts were both in full force and effect at the date of the extension of the ordinance of 1879 and are the acts which the Circuit Court construed as conferring only an implied power to grant an easement or way."

At another point, page 377, referring to the claim that much weight was attached by the counsel for the city in that case, to the effect that the authority of the city to consent to the Train Railway Act was in the form of a proviso, and was relied upon somewhat by the Circuit Judge in rendering his opinion, the Court of Appeal says:

> "The learned Circuit Judge seems to have attached much weight to the fact that this provision constitutes a proviso, for he says: 'The office of a proviso is usually that of a limitation. It here introduces a limitation in two ways; first, by making the franchise operative only on consent of the city; and second, by allowing the city, in giving its consent to surround the exercise of the franchise with such further limitations as it may choose to impose.'
>
> "While the ordinary purpose of a proviso is one of limitation, yet it is not always the case. It sometimes operates to broaden an act, and often introduces by way of abundant or excessive caution.

> Provisos should be strictly construed and their effect ascertained from a general view of the act to which they are attached. Southerland Statutory Construction, Par. 222. In the more elaborate Street Railway Act passed in 1867, and which must be looked to as one source of the city's power to pass an extension ordinance, this provision does not occur as a proviso."

Speaking further on the matter, on pages 379 and 380, the Court says:

> "The just, reasonable and fair interpretation of the provision in each act requiring consent is that nothing in either act shall be construed as authorizing any such road to occupy the streets of any city with its tracks and cars without first obtaining from such city a right of way necessary, which right may be granted by the city upon terms and conditions satisfactory to it and acceptable to the company, and that such consent to such construction and occupancy will not be subject to repeal or alteration when granted and accepted."

Speaking further, on page 380, the Court says:

> "However this may be, we are of opinion that these acts (meaning the Train and Street Railway Acts) do directly confer power to consent to such use of the streets, and that when such consent is once given and accepted, it is irrevocable for the term fixed by the grant."

On page 382 the Court further says:

> "We are thus to conclude that these street railway acts directly confer upon municipalities of the State power to grant to street railway companies such an easement or way in the streets as is requisite for the purposes to be accomplished."

At another point in the opinion, at page 375, referring to the Street Railway Act, the Court says:

> "By Section 3564, all the powers, rights, protections and privileges conferred by the act were extended to all companies theretofore organized in that State."

The opinion of the Court in this case all the way through proceeds upon the assumption that even though the companies with whom the renewal or extension contracts were made had been incorporated and were doing business under the provisions of the Train Railway Law, still that from the time of the passage of the Street Railway Act in 1867, they possessed all the powers, rights, protection and privileges conferred upon street railway companies by the Street Railway Act, and that all grants made to them subsequent to the date mentioned have for their validity and meaning to be construed in the light of the provisions of that act.

Even though that decision had not been made and the question had never been before the Court of Appeals, the language of the Street Railway Act is so plain and so clearly has for its purpose the scope and effect which we assert, that the Court cannot avoid reaching the conclusion that the complainant is entitled to the benefit of its provisions. The section which in direct terms grants to existing companies the powers, rights, protection and privileges thereby created, is not the only one having reference to the existing companies. Section 15 thereof authorizes the purchase of any existing road owned by any other corporation or company, with all of the real and personal estate belonging thereto, the rights and franchises thereof, and authorizes the purchasing company to use and maintain the same, and upon the same terms as the company whose road and franchises were so acquired, might have done.

At the time of the passage of this act there were no street railroad companies, or street railway lines, in existence except those organized or constructed under the Train Railway Act, so that clearly the Legislature had in mind such companies and such railways in the enactment of section 15.

Section 19 of the Street Railway Act provides as follows:

> "The Common Council or other corporate authorities of the city or village in which any street railway shall be located may from time to time by ordinance or otherwise establish and prescribe such rules and regulations in regard to said railway as may be required for the grading, paving and repairing of the streets, construction of sewers, drains, reservoirs and crossings, and the laying of gas and water pipes upon, in and along the streets traversed by such road, and to prevent obstructions thereon."

It will be noticed that this section immediately precedes the section which requires that the rate of toll or fare for transportation of passengers should be fixed by agreement between the city and the company, and a comparison of the two sections placed in juxtaposition clearly points out the distinction which the Legislature had in mind between those things which pertain to the construction and operation of the road, and the occupation of the street therefor and the substantial right of the company in the matter of tolls and fares.

It will be noticed in the above sections, 19 and 20, that the provisions are made to apply to any street railway company, and are not confined in their application to the companies organized under the provisions of the Street Railway Act proper.

Quoting again section 29, which is as follows:

> "All companies and corporations heretofore organized in this State for the purpose of building and operating street railways under the statutes then in force shall have the same powers, rights, protection and privileges, and shall be subject to all the liabilities as are hereby provided for companies and corporations organized under the provisions of this act."

We call the attention of the Court in connection therewith to the fact that the only statute ever in force in Michigan for the organization of street railway companies prior to the time of the passage of the Street Railway Act was the Train Railway Act, and there can be no question but the Legislature in enacting section 29 had in mind the companies that had theretofore been organized under the Train Railway Act for street railway purposes. Examining the Street Railway Act at length, one cannot avoid reaching the conclusion that while many of its provisions have express reference and are intended to regulate the affairs of companies organized thereunder, yet that many portions of it were intended to be general in their application, and to regulate, define and protect the rights of other corporations engaged in the same general business.

The decisions of the courts are numerous holding that even without such express application of the provisions of the statute to existing corporations as we find in this Railway Act, that general enactments by the Legislature touching corporations generally will be held to apply to existing corporations, and either to enlarge or diminish their rights,

powers and privileges; or to confer upon them additional protection or additional franchises.

C. That the grants by the city to the company were executed contracts, and that the relations between the city and company were contractual; and especially with reference to the substantial rights to construct and operate a road and to collect fare, is well settled as matter of general law. It will be found on examination that in most of the States, the right to occupy the streets of a city for street railway purposes and the terms and conditions upon which such right may be acquired have been left by the legislative bodies to the discretion of the municipalities, requiring in every case that the company shall obtain the consent of the municipality to the use of the streets, and that such consent shall be upon such conditions and requirements as the municipality may see fit to impose.

There is very little variation between the enactments touching this matter. They all seem to have about the same legal significance, and it is universally held that when such consent has been given and the conditions upon which such consent is given have been agreed to, that a contract is thereby created, and that the power of the city is exhausted so far as it has any power to deal with the substantial rights created by that contract.

This question has been before the Federal Supreme Court in a number of cases.

See Chicago vs. Sheldon, 9 Wallace, 50.

City Ry. Co. vs. Citizens' Ry. Co., 166 U. S.

In each it is expressly determined that an ordinance like the ones we have under consideration here is a contract measuring the rights of the parties during the term for which it is made.

See also Baltimore vs. Street Ry. Co., 64 Federal, 153.

City of Detroit vs. Detroit Citizens' Street Railway Company, 12 C. C. A., 365.

People vs. Western Division Railway Company, 111 Ill., 113.

Tudor vs. Chicago South Side Rapid Transit co., 164 Ill., 73.

State vs. Corrigan Street Railway Co., 85 Mo., 263.

City of Ashland vs. Wheeler, 88 Wis., 697.

City of Columbus vs. Street Railway Co., 45 Ohio State, 104.

Railway Company vs. Vilage of Carthage, 36 Ohio State, 634.

Street Railroad vs. Smith et al., 29 Ohio State, 292.

So far as the rule in Michigan is concerned, this question of the nature of the relations between street railway companies and municipalities established under grants like the ones in question here, is wholly disposed of by our Supreme Court in People vs. Fort Wayne & Elmwood Railway Company, 92 Mich., 522.

That was a case where they sought to prosecute quo warranto proceedings against the defendant to exclude it from laying its tracks upon a certain street under a street railway grant. The Court refused to entertain the proceeding, basing its decision upon a decision of the same Court in Maybury vs. Gas Light Compny, 38 Mich., 154, in which they said:

> "It (this grant) is not a State franchise but a mere grant of authority, which, whether coming from private owners or public agents, rests in contract or license and in nothing else. A violation of the contract or unauthorized intrusion must be redressed as all ordinary wrongs are redressed by the usual legal remedies. It in no wise concerns the State whether a power is granted or withheld, nor whether the corporation is or is not fulfilling its agreement."

The above case in the 33 Michigan was cited with approval in Attorney-General vs. Railway Company, 96 Mich., 65.

Clearly the right to collect a certain rate of fare for the carriage of passengers must be deemed a matter of contract under the circumstances, and in such cases as have arisen on that specific subject, the courts have uniformly held that where by the charter or act of incorporation the right is granted to the company to collect a certain rate of fare, it is deemed to be a contract right, which cannot be interfered with, or modified by subsequent legislation adverse to the company.

It is claimed that the right to regulate fares and tolls to be charged by railroad companies is within the police power of the State, that the rate cannot be fixed by contract so as to prevent the city or state from changing the same, but we do not so understand the authorities.

The principle decided, is in substance this: that while the Legislature in the exercise of its police power has the right to fix the rates to be exacted by railroad companies for the carriage of persons and proprty in the first instance, yet, that wherever it has in the charter or act of incorporation fixed the rate to be charged and authorized the company to charge that rate, or authorized the company to regulate and fix the tolls up to a certain maximum rate, a contract right is thereby created and conferred, and the grantee cannot be deprived of the right to exact the toll fixed, or the right to regulate the toll up to the maximum mentioned, by subsequent legislation.

The Supreme Court of Michigan in Pingree vs. Michigan Central Railroad Company, 76 Northwestern, 636, states:

> "That to the assertion that the right to regulate tolls belongs to the police power and cannot be bartered away, we reply that the almost uniform current of judicial authority is to the effect that such power may be given to corporations, and that where the intent to do so is clear, a subsequent attempt by the Legislature to fix tolls is the violation of a contract under the provisions of the Federal Constitution."

On page 637 it was quoted from the Missouri Supreme Court, which states:

> "Fixing rates in the charter is an exposition of what is reasonable and exclusion of tacit or implied conditions on the subject. It is the essential part of the contract of incorporation, the most important condition of its acceptance. The inducing cause of its acceptance. * * * That this was a valid contract by the city and inviolable by it we regard as settled authoritively by Federal and State decisions too numerous for citation. If anything is or ever can be settled in American constitutional law, the sanctity and inviolability of a contract between a State and individuals in the shape of a charter for a business enterprise, accepted and acted on by the corporators on the faith of its terms and

provisions must be so regarded. The appellee has the unquestioned right from time to time by its board of directors to fix the rates at which it will transport over its railroads, provided those rates shall not exceed the maximum prescribed by the charter. That is the contract. These terms were expressly made. On the faith of that capital was invested and the enterprise.....on that. It is not allowable now for one of the contract parties to interfere with the exercise by the other of its plainly granted rights. They are secured beyond the reach of legislation and cannot be impaired."

The attention of the Court is also called to the second opinion rendered in this court by Judge Taft in the case of the City of Detroit vs. Detroit Citizens' Street Railway Company et al., and reported in the 60th Federal Reporter, page 171.

It was claimed that the City of Detroit was estopped from asserting the invalidity of the extension contract because of the provisions of the contract of 1889, which provided for what are called workingmen's tickets at reduced rates of fare during certain hours of the day and the granting of transfer rights and privileges on the payment of a five cent fare; and also upon the workingmen's tickets so-called; and it was suggested by Judge Taft on the argument that the language of the provision as to the rates of fare indicated a limitation only upon the company, and that the reduced rates of fare might be imposed by the city without the consent of the company. The matter was argued, and in the second opinion was considered at some length by Judge Taft.

In that opinion he distinctly said that he was satisfied that the claim that the language only operated as a limitation upon the right of the company, is not sound. That under its terms, the company had a contract right to charge the full rate of five cents, and that the city could not, without the consent of the company, modify the contracts or require the company to carry for a less rate of fare.

The opinion in the 60th Federal Reporter is not discussed or considered in the argument and decision in the Court of Appeals.

The same rule was declared by the Supreme Court of the United States in Regan vs. Trust Company, 154 U. S., 362, in which Mr. Justice Brewer said:

"If the charter had in terms granted to the cor-

> poration power to charge and collect a definite sum per mile for the transportation of persons or property, it would not have been doubted that the express stipulation formed a part of the obligation of the State which it could not repudiate."

In Chicago, B. & Q. Railway Company vs. Iowa, 94 U. S., 155, Chief Justice Waite said:

> "It is within the power of the company to call upon the Legislature to fix permanently this limitation and make it a part of the charter, and if it was refused, to abstain from building the road and establishing the contemplated business. If that had been done the charter might have presented a contract against future legislative interference."

In Peik vs. Railway Company, 94 U. S., 164; Munn vs. Ill., 94 U. S., 113; and the C., B. & Q. Company vs. Iowa, above cited, the Supreme Court passed upon the question of the right of the State to regulate the charges by railroad companies for fares and freights, sustaining the exercise of that power only in the absence of a provision in the charter fixing the rates of fare.

To the same effect is State vs. Maine Central Railway Company, 66 Maine, 488.

The cases last above cited are of value in another phase of this question, and that is this: If the Legislature itself could, in the granting of a charter to a company or in the provisions of a general act of incorporation under which a company might be formed, fix the rates of fare and thereby create a contract right which it would not be permitted afterwards to impair or change adversely to the interests of the company, it clearly would have the power and the right to say that the authority lodged in the city to deal with the question of fares must be limited to the exercise of a contractual power in that respect, and that in dealing with that part of the subject matter in making its contract with the railroad company by which the company would have the right to enter upon the streets and construct and operate a railroad, the terms of the grant should be a matter for agreement and contract, thereby giving to the city only a limited authority to deal with the subject matter, and not conferring upon it any general legislative authority over the question of fares.

If as matter of general law the relations between the company and the city are contractual, and that when the Legislature deals with the question of the rates of fare, and in the charter grants to the company the right to exact a certain rate of fare, a contract is thereby created

as matter of law; how much more so is that true in the case at bar when considered in the light of Section 20 of the Street Railway Act, which in express terms removes the question of the rates of fare from the domain of general legislative authority and jurisdiction, and declares that it shall be a subject of agreement alone.

What is the legal significance of Section 20? An examination of both the Train Railway and Street Railway Acts fails to disclose any provision, other than Section 20 of Street Railway Act, that can be said to confer specifically on the city the power to deal in any way with the subject of the rates of fare for the carriage of passengers on street railroads. While in the absence of such provisions it would be proper for the city in granting its consent to fix the maximum rate of fare which might be charged for the carriage of passengers on the proposed railway, as was done in the first instance when the grants were made solely by authority of the Train Railway Act; yet when the Street Railway Act was passed containing Section 20, that section became the rule by which the city must be guided in dealing with that question from that time forward; and if it undertook to deal with a street railway company either in the making of a new and independent grant, or by re-executing or extending a grant theretofore made, its action with reference thereto must be conclusively presumed to be subject to and in accordance with the terms of Section 20. From the time of its enactment it became the sole measure of authority of the city to deal with the question of fares, and whatever it did must be considered as done in accordance therewith and under the authority thereby granted.

It is not only to be considered as a grant of authority to the city to deal with the subject, but also is to be considered as a limitation upon the authority of the city to deal with the subject, and is the full measure of that authority.

This is clearly so under the well settled rule that where authority is given to a municipality to act in a certain manner with reference to a certain subject matter, the terms of the grant constitute the full measure of the authority conferred; and if the mode in which that authority is to be exercised is declared by the enactment, then the mode becomes an essential part of the grant, and the authority therefor can only be exercised in the mode pointed out; and therefore when the city agreed that the street railroad company might charge a certain rate of fare by the making of a grant containing the provision fixing the rate of fare, which grant was accepted by the company, it

will be presumed to have thereby exercised the contractual power conferred upon it by Section 20.

The terms of the section exclude and forbid the idea that the city retained, if it ever had, any general legislative power, over the subject. It is not an independent authority which the city possesses over the matter, because it can only be exercised in co-operation with the railroad company; nor is it legislative, because in express terms the section requires the consent of the company and that an agreement shall be reached as to the rates of fare.

Loveland vs. The City of Detroit, 41 Mich., 367, illustrates this proposition. In 1861 a new system of police was organized for the City of Detroit. A Board of Police Commissioners was created, and most of the police arrangements were specially entrusted to this board, and the officers provided for by the act. It was provided in the Police Act as follows:

> "The Common Council shall have power by a vote of two-thirds of all the aldermen elected to authorize the Board of Police Commissioners to offer a reward for the detection and apprehension of any offender against the city ordinance, or of the perpetration of any high crime or misdemeanor committed within the city, to be paid on the conviction of such offender or criminal."

In November, 1874, the Common Council passed the following resolution:

> "Resolved, That the Mayor be, and he is hereby authorized to offer a reward of five hundred dollars for the apprehension and conviction of any person who has been since the first day of October of the present year, or who shall hereafter be concerned directly or indirectly in any act of incendiarism in the City of Detroit."

In accordance with the resolution the Mayor by proclamation offered a reward of $500 and the plaintiff Loveland earned the reward so offered by securing the conviction of a criminal. The city refused to pay the reward and he brought action for its recovery; and the Supreme Court of the State held that the provision of the Police Board Act which I have quoted, namely, that the Common Council might authorize the Board of Police Commissioners to offer a reward, was the sole and only au-

thority which the city possessed to offer rewards; and that it must be made in the manner and through the channel pointed out in that provision. It was claimed that the city, prior to the adoption of the Police Board Act, had the general power to offer rewards for the conviction of offenders, which it must be assumed was broad and discretionary, and such power was not taken away by the adoption of the provision contained in the Police Board Act. In reference to that the Court says:

> "We cannot reconcile such a guarded provision with any reserved power to give rewards by the action of a mere majority of the council, and through other agencies than that in charge of the police supervision. It is quite unimportant whether we suppose there was or was not any implied power before Chapter 13 was adopted. If there was such power, we think that chapter had the effect of defining and limiting it. If it does not limit the power it is senseless and useless. * * * We think the council could not authorize the Mayor independently of the Police Board, to offer the reward in question."

Acting upon that view, the Supreme Court denied the right of the plaintiff to recover.

Can it be said that the provision which we have quoted authorizing the council to offer a reward through the Police Board for the arrest and conviction of criminals is any more guarded in dealing with that subject matter, or any more explicit in its terms than Section 20 of the Street Railway Act is in fixing and defining the character of the authority which the city has over the subject of fares, and the method by which it shall be exercised? The general doctrine on this point is well stated by the late Justice Field in Zottman vs. San Francisco, 20 California, 96. He states it as follows:

> "The rule is general and applies to corporate authorities of all municipal bodies; where the mode in which their authority on any given subject can be exercised is prescribed by their charter, the mode must be followed. The mode in such case constitutes the measure of their power. * * * Aside from the mode designated there is a want of complete power on the subject."

D. Touching the effect of the reservations of power claimed to have been made by the city in making the

original grants and stated in the fourth proposition of law, the attention of the Court is called to the exact language of the clauses. We repeat in full the one contained in the original Detroit City Railway grant, the language of all the others being identical. It is as follows:

> "Section 19. It is hereby reserved to the Common Council of the City of Detroit the right to make such further rules, orders or regulations as may from time to time be deemed necessary to protect the interest, safety, welfare or accommodation of the public in relation to said railways."

It will be noted that the terms used are, that they shall make such *further* rules, orders or regulations as may be necessary to protect, etc.

This language is significant. It does not reserve the right to make other rules than those made by the grant touching the same subject matters, or to change any of the existing rules and regulations; or to amend or alter any portion of the grant. The plain common sense meaning of it is, that the Council thought there might be some matters not treated of or regulated in the original grant, and that it would be wise to in express terms reserve the power to maks such additional rules as might be necessary in the opinion of the Council to protect the interests of the public. It can have no other meaning.

Clearly this clause cannot, by any process of reasoning or any known rule of construction, be held to reserve in the city or confer upon the city a power or authority which it did not have in the first instance, the right to make changes in the substantial and essential characteristic of the grant, as for illustration: These further rules and regulations must under all canons of interpretation be held to have reference to those matters over which the city could exercise independent action without being obliged to obtain the consent of the company thereto. The language of the clause is "It is *hereby reserved to the Common Council of the City of Detroit* the right to make such *further* rules, orders, etc. This is the phraseology of a reservation by which the city retains the freedom to exercise a power already possessed and not exhausted. To include within it the right or power to independently re-establish the rates of fare is to give it the scope and effect of conferring on the city a power which the Legislature clearly did not intend it to possess, and to give it the force and effect of a distinct grant or concession of authority from the company having no warrant in the statute and wholly outside thereof. It might be said to have reserved to the city, if

such reservation were necessary, the right to make rules as to the speed of the cars, the number of cars that should be operated for the accommodation of the traveling public, the size of the cars, the number of people allowed to ride therein, the points along the various streets at which the cars will be permitted to stop, and where tickets are by agreement required to be sold, to require them to be sold upon the cars, because these things do not affect and in a legal sense impair the grant made to the company; nor would such regulations deprive the company of any substantial property rights.

On the other hand, it is self-evident that if they can, by adverse legislation, cut down the rate of fare which the company is entitled to charge by the terms of the agreement, they could also cut down the term for which the grant was made. Both are substantial property rights, and each forms a part of the consideration, and together, in substance, form the whole consideration upon which the grant was made and accepted, and for which the company assumed the obligation to construct, maintain and operate a street railway and perform the duty of carrying passengers.

There can be no difference between the two in so far as their effect upon the property of the company is concerned; because it would be no more an invasion or lessening of property rights of the company to cut down the term of its grant from thirty to twenty-five years, leaving the rates of fare as they were in the beginning, than it is to cut down the rate of fare forty per cent of the amount fixed by the original contract, as is attempted in this case, leaving the term of the grant as it stood before.

Judge Cooley, in a case involving a question of what was meant by what is termed corporate rights, included in the classification the right to construct, maintain and operate the road and the right to collect tolls for the carriage of passengers and property thereon. Those are substantial rights and cannot be intended as included within the class of things over which and in regard to which the Common Council reserved the power of regulation. It cannot be believed for a moment that such was the understanding of the parties when the contract was made, because if it was intended that the Common Council might under such reserved power either shorten the franchise or grant, or lessen the rate of fare to be charged for the transportation of passengers, then the right to operate the road and the right to receive remunerative and compensatory revenue therefrom were simply optional in their character, liable

to be practically destroyed at the will of the city. The making of a rule or a regulation with reference to the management or use of property in connection with the public cannot, by any course of reasoning, be extended to the destruction of the property or to the entire changing thereof.

We are not without authority in support of this view. (See Old Colony Trust Company vs. The City of Atlanta, 83 Federal Reporter, 39, afterwards affirmed by the Circuit Court of Appeals for the Fifth Circuit in The City of Atlanta vs. Old Colony Trust Company et al., 88 Federal Reporter, 859.)

This case is an authority upon the question of the right to reduce the rates of fare, and also to compel the giving of transfers where transfers were not called for by the original agreement; and the power of the city was denied in both respects.

The court, in that case, had to consider four propositions made by the counsel for the city in support of the validity of the attempted legislation.

First. It was claimed that the language of the city charter of Atlanta, which empowered the city to pass all by-laws concerning carriages, wagons, carts, drays, etc., and every by-law, ordinance and regulation that it may deem proper for the peace, health, order and good government of the city conferred upon the municipality the authority to enact the ordinances in question.

It seems that the charter provision authorized the city by ordinance to regulate hack and dray charges. The court held that such a provision in the city charter had no reference to the matter of street railroads or the rate of fare to be charged thereon.

It was further sought to sustain the ordinances under the terms of a provision in the act of incorporation of the street railroad company to the effect:

> "That the rates of fare and freight upon said railroad shall be subject to the approval of the Mayor and City Council of the City of Atlanta."

With reference to that proposition the court says:

> "It is insisted that under the language quoted which makes the rates of fare subject to the approval of the Mayor and City Council, the city has the power to fix rates. Soon after the passage of this act an ordinance was passed by the city authorizing the use of the streets. The company did not build under the first ordinance, but subsequently in

> 1868 or 1869, as it appears from the bill, another ordinance was passed, and under this it is alleged that the Atlanta Street Railroad Company constructed its lines. Among other things, there was a provision in the ordinance under which the lines were built that 'the charges for passage on said road shall not exceed twenty cents for any through line, and ten cents for half lines or short distances.' We do not express any opinion upon the question raised and discussed at the bar as to whether this constituted a contract between the city and the street railroad company from which the city could not withdraw, because other conclusions we have reached render its determination unnecessary. This change is manifestly to the effect that if the city derived from the above quoted provision of the charter of the Atlanta Street Railroad Company any power to fix rates of fare, it exhausted that authority when it passed the ordinance referred to fixing the rates of fare at twenty and ten cents respectively."

The court, proceeding further, holds that the power vested in the city by the charter of the company to approve rates, does not authorize the city, independently and on its own motion, to fix rates, and is a direct authority upon the proposition that only the power expressly granted by the statute can be exercised by the city.

Citing in support of the proposition Cincinnati, New Orleans & Texas Pacific Railroad Company vs. Interstate Commerce Commission, 162 U. S., 184.

Second. It was further sought to sustain the ordinance in that case under the provisions of a validating act with reference to street railroads in question to the effect that those street railroad companies should

> "Be subject to pave, and shall be liable for street paving and other regulations of municipal corporations as are other railroads and street railroad companies incorporated by separate act or acts by the law of this State."

The attention of the court was called to certain street railroad charters, one of which, at least, contained a provision authorizing the city to fix rates of fare, and that the power was, therefore, given to the City of Atlanta.

The court disposes of that proposition by holding that the power of regulation did not embrace the power to fix

rates of fare, pointing out that it unquestionably referred to regulation of the speed of cars and their movement on the streets, location of poles, stringing of wires and the protection of the public therefrom.

Third. It was claimed that the reservation made by the city in the ordinance or grant in that case that the company should be

> "Subject to all the laws and ordinances now in force and such as may be hereafter made,"

authorized the city to pass an ordinance fixing the rates of fare under discussion.

In denying that proposition the court says:

> "Of course this ordinance should be treated as contended for by counsel for the consolidated company, and the word 'legally' should be read into it, and should read as though it said such ordinances 'as may be hereafter legally made;' and the question, therefore, recurs to and is, what legislative grant has the city empowering it to pass this transfer ordinance? As we do not find in any of the acts of the Legislature relied upon the power to pass the ordinance, we are compelled to hold that the city exceeded its authority in passing it. We hold, moreover, that before the city can exercise the power to fix rates of fare for a street railroad company it must obtain that power in express terms, or it must arise by necessary implication from the words used in the legislative act. The power of the State over the subject matter need not be discussed. We are dealing with the power of a municipality, a creature of the Legislature, which derives all its authority from the Legislature, and can only act within the limits of the legislative grant. If under any of the acts of the Legislature which have been discussed it might be held that the city had the power, by necessary implication, to regulate or to fix rates of fare for street railroads or for this particular company, it might be gravely questioned even then if it had the power to pass that particular ordinance in question requiring transfers. It would be a subject of serious doubt at least if the authority to fix rates carried with it the authority to require the street railroad to give two or three or more rides for one fare. One continuous ride for a single fare is

one thing, and two or more rides with the necessary stoppage and letting passengers off and taking them on is another and entirely different thing. Many reasons have been urged in argument and others might be suggested which, in our opinion, made a broad distinction between the two classes of service, namely, between a continuous ride in one car and a right to require transfers from one or more cars to others. Unquestionably this ordinance as to its feature requiring transfers is a very broad exercise of municipal power. It appears to go to the limit of municipal control even under legislative authority. The power to pass an ordinance should be clearly shown. On the contrary, it is clear to us that the city is without such power. As we understand the opinion above expressed on the first question involved, namely, as to the power of the city to pass the ordinance in question, it is unnecessary to go into the second ground on which the ordinance is attacked in the complainant's bill. The question of the reasonableness or unreasonableness of the ordinance becomes immaterial if the city lacked legislative authority to pass it."

In conclusion, the opinion holds the ordinance invalid.

The case was taken to the Court of Appeals for the Fifth Circuit, and, as above stated, it is found in the 88th Federal Reporter, 859, and in a short percuriam opinion the conclusion of the Circuit Court upon all the points, together with the reasoning in support thereof, is fully approved of and sustained.

A very strong decision covering the points raised here was rendered in Africa vs. Board of Mayor and Aldermen, 70 Federal Reporter, page 729.

The question was before the Michigan Supreme Court in Electrical Railway Company vs. City of Grand Rapids, 84 Michigan, 257. In that case the company obtained the approval of the Common Council of Grand Rapids for the kind and pattern of poles to be used in its system, and the permission to use wooden poles in certain sections, such permission containing the following clause:

"In consideration of granting said street railway company the privilege of erecting said wooden poles in certain public streets of the city, said company shall be required to furnish its patrons, through its conductors, drivers or agents on or in charge of their several street railway cars, without additional

> cost, transfer tickets on the following named lines, viz: Cherry street and Eighth Ward line; West Bridge street and Ionia line; Wealthy avenue and Scribner street line; passengers to be on demand furnished with transfer tickets good on the so-called Hall street and Plainfield avenue line, and said Hall street and Plainfield avenue line passengers to be on demand furnished with transfer tickets good on the above enumerated lines, viz: Cherry street and Eighth Ward line; West Bridge street and Ionia line; Wealthy avenue and Scribner street line."

The question in the case was whether the Common Council could attach such a condition to the approval of the poles and require the company to furnish the transfers which they were not required to furnish under the original grant. The court cites the provisions of the Street Railway Act, especially sections 13 and 14, and disposes of the case, holding that the permit and approval of the poles was valid and entitled the company to proceed under it, but that the condition requiring the furnishing of transfers was invalid as beyond the power of the city. Their holding, in brief, was:

> "That the condition attached to the use of wooden poles outside of such fire limits is wholly inoperative and void, and beyond the power of the council to prescribe. This provision is in direct conflict with Section 14, Chapter 95, Howell's Statutes, and is an attempt to deprive the relator of the rights and privileges conferred by the ordinances theretofore adopted and the terms of which it is conceded the relator had duly accepted."

This decision seems to dispose of this case.

It may perhaps be claimed that the case of the City of Detroit vs. Fort Wayne & Belle Isle Railway Company, 95 Michigan, 456, furnishes some support of the claim of the city in this case. That case involved simply whether the company, having agreed in the ordinance of 1889 to sell the so-called workingmen's tickets at the rate of eight for twenty-five cents, good for passage at certain hours of the day, could be required to furnish its conductors on its cars with such tickets for sale, or keep them for sale on its cars at all times. The Supreme Court simply held that that was a regulation for the convenience of the public and was a valid exercise of power within the reservation contained in the original grant

to the city to make such further rules, orders or regulations as it might deem desirable. It clearly has no reference to such a question as raised here.

E. What has been said with reference to the propositions there discussed renders it unnecessary to say anything further in regard to the fifth proposition of law. The cases cited fully dispose of that question, therefore we will briefly consider again the sixth proposition of law, viz., that by the terms of the various agreements, the companies obtained the right to charge the full fare of five cents; and there is no difference in legal signification between the statement that the fare "shall not exceed five cents" and a statement that the rates of fare "shall be five cents."

If we are right in our proposition that the power of the city is simply the right to make a contract with the company as to the rate of fare, then having made a contract with the company as to the maximum rate of fare which it shall charge, any attempt to lessen the maximum rate of fare is such a violation of the contract, as though in the original agreement it said in flat terms that the rate of fare should be five cents, and the city should afterwards attempt to require that the rate of fare should be three cents. The city will be conclusively presumed in making its agreement with the company to have agreed that the maximum rate fixed, to-wit, five cents, is a reasonable charge for the carriage of a passenger, and that such rate should remain a reasonable charge during the full term of the grant; and the Legislature having authorized the city to make a contract fixing a maximum reasonable rate of fare and the city having made such a contract, neither the Legislature acting directly or through the instrumentality of the city, will be heard thereafter to say that the maximum rate of fare fixed by the contract is not a fair charge, and that the company shall not continue to have the right to make the full charge fixed.

Assuming that the Legislature has undertaken directly or indirectly to confer upon the city the power to regulate rates of fare upon street railroads and to require that passengers shall on demand be transferred and carried free of charge on some other line or route constructed and operated under independent municipal grants; and that such authority was conferred since the making of the contracts in question, and that the ordinances in question were passed in the exercise of that authority; then we say they are an impairment of the contract rights of the complainant and void under the provision of the

Federal Constitution prohibiting any State from passing any law impairing the obligation of a contract.

The Legislature, by the terms of sections 13 and 20, conferred upon the city the power to grant to a street railroad company the right to construct its road in the streets and subject to such conditions as it might desire to attach thereto, and to agree with the company as to the rate of fare. When the city thus authorized has acted, a contract right is created and conferred which is wholly beyond the power of the Legislature to alter or impair. This is clearly the rule established by all of the authorities, and notably the case of the City Railway Company against the Citizens' Railway Company, in the 166th U. S., page 557. In fact, no case can be found involving the question of interference with the rights of street railway companies under their grants where the circumstances were not that the Legislature had authorized the municipalities to make the contract, and the contract having been made, the municipality claiming either direct or indirect authority from the Legislature thereafter undertaking to alter or change the contract adversely to the interests of the company; and in no case was it held that there was any reserve power in the Legislature to deal with the subject matter which took the contract out from under the protection of the Federal Constitution.

It is respectfully submitted that the decision of the court below should be affirmed.

M. BRENNAN and
JOHN C. DONNELLY
Counsel for Appellee.

UNITED STATES OF AMERICA.

SUPREME COURT OF THE UNITED STATES.

THE CITY OF DETROIT,
WILLIAM C. MAYBURY, Mayor,
CHARLES FLOWERS, Corporation Counsel,
Appellants,
vs.
THE DETROIT CITIZENS' STREET RAILWAY COMPANY,
Appellee.

BRIEF FOR APPELLEE.

STATEMENT OF THE CASE.

We will first set forth the constitutional and statutory provisions of the State of Michigan to be considered in this case.

CONSTITUTIONAL PROVISIONS.

"Corporations may be formed under general laws, but shall not be created by special act except for municipal purposes. All laws passed pursuant to this section may be amended, altered or repealed."

Art. 15, Sec. 1.

"The legislature may confer upon organized townships, incorporated cities and villages, and

upon the board of supervisors of the several counties, such powers of a local, legislative and administrative character as they may deem proper."

Art. 4, Sec. 38.

STATUTORY PROVISIONS.

To facilitate the construction of tram railways to connect the mines of Lake Superior with the lake shore, the Michigan Legislature, in 1855, passed "An Act to provide for the construction of train railways."

Mich. Laws of 1855, p. 338.

The use of the word "train" in this act instead of the word "tram" was a mistake in printing the laws.

In 1861 the legislature amended the tram railway act so as to authorize the construction of street railways under it, by adding two sections to the act:

> "Sec. 33. It shall be competent for parties to organize companies under this act to construct and operate railways in and through the streets of any town or city in this State.
>
> Sec. 34. All companies formed for such purpose shall have the exclusive right to use the same: Provided, however, That no such company shall be authorized to construct a railway under this act, through the streets of any town or city, without the consent of the municipal authorities of said town or city; and under such regulations, and upon such terms and conditions, as the said authorities may from time to time prescribe."

Mich. Session Laws, 1861, p. 11.

In 1863, and before any street railway corporation had been organized under the act, two additional sections were added to the act authorizing street railway corporations "to borrow money for the purpose of constructing and operating the road or roads proposed to be constructed by them, and for that purpose to mortgage or create any other lien upon their franchise, road, superstructure, fixtures, rolling stock and equipments; and whenever such corporation or association shall have acquired a simple easement or right of way for its proposed road or any part thereof, and shall have made and filed its

articles of association in conformity to the provisions of the act hereby amended, any mortgage or mortgages executed by such corporation or association upon the route or routes where such easement or right of way has been obtained as aforesaid, shall be a legal and valid lien upon the right of way so obtained," etc.

It was also provided that in case any street railway corporation desired to build or extend its tracks along any of the public highways of the State not included within the limits of any city or incorporated village, it should have the exclusive right so to do, "provided such corporation or association shall first obtain the written consent to such building and extension of the supervisor and a majority of the commissioners of the highways of the town or towns in which such highways are located respectively, and which said consent may contain such regulations in reference to the construction, location and operation of the portion of said road in such town or towns as may be agreed upon between the corporation and said officers respectively."

Mich. Laws, 1863, p. 33.

In 1867 Section 34 of the Tram Railway Act above set forth was amended by adding to the section another proviso as follows:

> "Provided further, That after such consent shall have been given and accepted by the company or corporation to which the same is granted, such authorities shall make no regulations or conditions whereby the rights or franchises so granted shall be destroyed or unreasonably impaired, or such company or corporation be deprived of the right of constructing, maintaining and operating such railway in the street in such consent or grant named, pursuant to the terms thereof."

I. Mich Laws, 1867, p. 257.

At the same session of the legislature a general street railway law was passed entitled, "An Act to provide for the formation of street railway companies."

I. Mich. Laws of 1867, p. 46.

The sections of this act to be considered in this case are as follows:

> "Sec. 13. Any street railway corporation organized under the provisions of this act, may, with the

consent of the corporate authorities of any city or village, given in and by an ordinance or ordinances duly enacted for that purpose, and under such rules, regulations, and conditions as in and by such ordinance or ordinances shall be prescribed, construct, use, maintain and own a street railway for transportation of passengers, in and upon the lines of such streets and ways, in said city or village, as shall be designated and granted from time to time for that purpose, in the ordinance or ordinances granting such consent; but no such railway company shall construct any railway in the streets of any city or village until the company shall have accepted in writing the terms and conditions upon which they are permitted to use said streets; and any such company may extend, construct, use and maintain their road, in and along the streets or highways of any township adjacent to said city or village, upon such terms and conditions as may be agreed upon by the company and the township board of the township, which agreement, and the acceptance by the company of the terms thereof, shall be recorded by the township clerk, in the records of his township. Any company organized under the provisions of this act, may construct, use, maintain and own a street railway for the transportation of passengers, in and along the streets and highways of any township, upon such terms and conditions as may be agreed upon by the company and the township board of the township, which agreement and the acceptance by the company of the terms thereof, shall be recorded by the township clerk in the records of the township.

Sec. 14. After any city, village or township shall have consented, as in this act provided, to the construction and maintenance of any street railways therein, or granted any rights and privileges to any such company, and such consent and grant have been acepted by the company, such township, city or village shall not revoke such consent, nor deprive the company of the rights and privileges so conferred.

Sec. 15. Any street railway company may also purchase and acquire, either at public or private sale, whether judicial or otherwise, or may hire any street railway in any city, village or township,

owned by any other corporation or company, together with all real and personal estate belonging thereto, and the rights, privileges and franchises thereof, and may use, maintain and complete such road, and may use and enjoy the rights, privileges and franchises of such company, the same, and upon the same terms, as the company whose road and franchises were so acquired might have done. Every street railway company may also purchase, hold, own or take upon lease such real estate, barns, stables, buildings, fixtures and property as may be necessary for the use and business of their road; and the whole or any part hereof, together with their railway fixtures, property and appurtenances, rights, privileges and franchises, may sell, lease, dispose of, pledge or mortgage whenever the corporation shall deem it expedient so to do.

Sec. 18. Every street railway company is hereby required to lay the track of their road or railway in such way or mode and with such kind of rail, and to keep their railway and that part of the street and pavement within and adjacent to the track of such road or railway, in such condition and state of repair as shall be prescribed and provided in the consent, grant or agreement of the municipal authorities permitting the construction and location of such road or railway.

Sec. 19. The common council or other corporate authorities of the city or village in which any street railway shall be located may from time to time, by ordinance or otherwise, establish and prescribe such rules and regulations in regard to said railway as may be required for the grading, paving and repairing the streets and the construction of sewers, drains, reservoirs and crossings, and the laying of gas and water pipes, upon, in and along the streets traversed by such roads, and to prevent obstruction thereon.

Sec. 20. The rates of toll or fare which any street railway company may charge for the transportation of persons or passengers over their road, *shall be established by agreement between such company and the corporate authorities of the city or village where the road is located*, and shall not be increased without consent of such authorities.

Sec. 29. All companies and corporations *heretofore* organized in this State for the purpose of building and operating street railways under the statutes *then* in force, shall have the same powers, rights, protection and privileges, and shall be subject to all the liabilities as are hereby provided for companies and corporations organized under the provisions of this act.

Sec. 30. All companies and corporations hereafter formed for the purpose of constructing, owning or using any street railway for the transportation of persons and passengers, in any city or village, shall be organized under the provisions of this act, and shall be subject to the provisions of chapter seventy-three, of the compiled laws of this State, and to all other general laws of this State, relating to corporations, so far as the same may be applicable to corporations formed under this act, and the legislature may alter and amend, or repeal this act at any time."

The acts from which we have quoted the foregoing provisions constitute Chapters 167 and 168 of the last compilation of the laws of Michigan.

2 Mich. Comp. Laws, 1897, pp. 2027, 2037.

TAXATION.

Section 22 of the Tram Railway Act and Section 26 of the Street Railway Act of 1867 were the same, viz:

> "Each and every railway company formed under this act shall pay to the treasurer of the State of Michigan an annual tax, at the rate of one-half of one per cent on the whole amount of capital paid in upon the capital stock of said company; which said tax shall be estimated upon the last preceding report of said company, and shall be paid to the said treasurer on the first Monday of July in each year, and shall be in lieu of all other taxes upon all the property of said company."

Both were repealed in 1882.

Mich. Public and Local Acts, 1882, p. 4.

This repeal left the property of the street railway corporations to be taxed under the general tax laws of the State; and it resulted in a controversy between the Detroit City Railway and the City of Detroit to be hereinafter referred to.

LOCAL GRANTS.

The first street railway grant made by the City of Detroit was contained in an ordinance approved November 24, 1862. It was amended December 27, 1862, and January 12, 1863, and it was soon afterwards accepted by the grantees who organized the Detroit City Railway under the Tram Railway Act for that purpose. The sections of the ordinance requiring consideration in this case are as follows:

> "Section 1. That consent, permission and authority is hereby given, granted, and duly vested in Eben N. Wilcox, and his associates, who may be approved by the council, their successors and assigns, organized into a corporation, under the laws

of the State of Michigan, as aforesaid, to lay a single or double track for a railway, with all the necessary and convenient tracks for turnouts, side tracks, and switches, in and along the course of the streets of, and bridges in, the City of Detroit, hereinafter mentioned, and the same to keep, maintain and use, and to operate thereon railway cars and carriages, during all the term hereinafter specified and prescribed, and in the manner and upon the conditions set forth in this ordinance. (As amended December 27, 1862.)

Section 8. The rate of fare for any distance shall not exceed five cents in any one car, or on any one route named in this ordinance, except where cars or carriages shall be chartered for specific purposes: Provided, cars so chartered shall not be considered regular cars, within the meaning of the preceding section.

Section 19. It is hereby reserved to the Common Council of the City of Detroit the right to make such further rules, orders or regulations, as may from time to time be deemed necessary to protect the interest, safety, welfare, or accommodation of the public, in relation to said railways.

Section 20. The powers and privileges conferred by the provisions of this ordinance shall be limited to thirty years, from and after the date of its passage.

Section 22. The said grantees, and their assigns, shall pay to the treasurer of the City of Detroit, annually, fifteen dollars on each and every passenger, or other car, excepting only those cars used for cleaning the track on said roads, to be collected as a license, for the use of the city, after the term of five years from and after this date."

Record, p. 113.

Numerous supplementary grants were made to the Detroit City Railway. Other grants were made to corporations organized either under the Tram Railway Act or under the Street Railway Act of 1867, which corporations subsequently sold and assigned their roads to the Detroit City Railway or to its successor, the Detroit Citizens'

Street Railway Company. It is sufficient to say of them that the grants were made by ordinances substantially in the same form as the original grant, above set forth, to the Detroit City Railway.

By an ordinance approved November 14, 1879, and duly accepted by the Detroit City Railway and the other railway corporations named in it, provision was made for the payment by the Detroit City Railway of a city tax of one per cent on its annual gross receipts. New stipulations were also entered into in regard to street paving. The ordinance also contains the following provisions:

> "The foregoing special tax and undertaking as to paving shall be in lieu of license and other taxes, and charges for paving under existing ordinances."
>
> "The powers and privileges conferred and obligations imposed on the Detroit City Railway Company by the ordinance passed November 24, 1862, and the amendments thereto are hereby extended and limited to thirty years from date."
>
> "The right to amend or repeal this ordinance in case of its violation by said company is expressly reserved."

The repeal in 1882 of the State specific tax on street railway companies was claimed by the city to subject the property of the Detroit City Railway, notwithstanding the provisions of the ordinance of November 14, 1879, to the payment of general city taxes. This claim on the part of the city resulted in litigation between it and the company. The controversy was finally adjusted between the parties by an ordinance passed over the mayor's veto by the common council January 1, 1887. The provisions of that ordinance are as follows:

> "Section 1. From the first day of July, 1882, to the thirty-first day of December, 1896, said railway shall pay to the city treasurer one and one-half per cent of its gross receipts. From the first day of January, 1897, to the end of its franchise, under the ordinance approved November 14th, 1879, said railway shall pay to the city treasurer two per cent of its gross receipts. At the expiration of each half year during the entire period above mentioned the treasurer of said railway shall submit to the city treasurer his sworn statement of such gross receipts, and shall therewith pay to the said city treasurer the percentage so found to be due.

Section 2. From the first day of July, 1882, to the end of its franchise under the ordinance approved November 14, 1879, said railway shall also pay the City of Detroit such taxes as have been up to this date and shall be thereafter levied and assessed in the same manner, and shall be payable at the same time as other city taxes on lands.

Section 3. In adjusting the amount due under the foregoing sections, from the first day of July, 1882, to the thirty-first day of December, 1886, the railway company shall be credited with all sums heretofore paid by them on account of taxes or percentages on gross receipts, no interest shall be charged to either party. The railway shall pay to the city treasurer such balance as may be found due, forthwith upon its ascertainment. Thereupon all suits and proceedings between the city and railway company shall be discontinued without costs to either party, and all unsettled claims in reference to such taxes shall be discharged by both parties.

Section 4. The above mentioned percentage payments and the tax on lands, provided for to accrue from January 1st, 1887, to the end of the franchise of said railway, are to be paid by said railway company and received by the city in lieu of and in discharge of all taxes, license fees and charges of any kind against the property, capital stock, rights and franchises of said company, which have been made or may be levied, assessed or imposed under any present or future law or authority. If hereafter said railway shall be either directly or indirectly charged with or required to pay any other or further tax, license fees or charges, then the amount so paid shall be credited by the city to said railway, upon the payment of the percentage payments to become due under the ordinance; and the obligation to make such percentage payments shall be satisfied and discharged to that extent; and, in no event shall said railway be liable to pay under any form of tax, license or charge, any sums in excess of said percentage, and the tax on the lands of the said railway as above provided. Provided, however, that nothing herein contained shall be construed as a consent on the part of the Detroit City Railway to

the levying or collecting of any further tax, license or charge than the tax on the gross receipts, hereinbefore provided for, and the tax on its lands hereinbefore specified; nor shall any such other or further tax, license or charge be valid or binding without the consent in writing of the said Detroit City Railway.

Section 5. Subject to the provisions of this ordinance, which are only intended to change the provisions of the ordinance of November 14, 1879, as to the percentage on gross receipts, all ordinances and parts of ordinances not inconsistent herewith are hereby affirmed and continued in force.

Section 6. This ordinance shall take effect when the Detroit City Railway has filed its written acceptance of the same with the city clerk."

An ordinance passed by the Common Council January 3, 1889, and duly accepted by the company contains the following provision relating to rates of fare:

"Section 4. The above-mentioned additional lines shall be operated in connection with and as a part of the present system of the Detroit City Railway, but the permission and authority hereby given shall be inoperative and void, unless the said Detroit City Railway shall file a written acceptance thereof within thirty days from the date of the passage of this ordinance, in which the said company shall agree to do and perform the following with reference thereto, to-wit:

(a) It shall carry passengers from its Cass avenue and Third street, Trumbull avenue, Michigan avenue, and Congress and Baker street lines to any point on the proposed line on Fort street east, or to the easterly terminus thereof, for a single fare of five cents for one continuous trip, and from the easterly terminus of the proposed line on Fort street east, or from any point thereon, to any point on Congress and Baker streets, Michigan avenue, Trumbull avenue and Cass avenue and Third street lines for a single fare of five cents for one continuous trip.

A passenger paying a single fare of five cents on the line hereby authorized to be constructed on Joseph Campau, Atwater and Chene streets, shall

be entitled to be transferred at Fort street to and conveyed by cars running on the proposed line on Fort street east to any point on said Fort street line in one continuous trip, or to be transferred at Gratiot avenue to the line on said Gratiot avenue, to be carried to any point on said Gratiot avenue and Michigan avenue lines in one continuous trip.

(b) A passenger paying a single fare of five cents on the Gratiot avenue line shall be entitled to a continuous ride on said Gratiot avenue line and proposed lines on Chene street and Fort street to the Belle Isle bridge; and from the Belle Isle bridge in reverse direction, over the Fort street east, Chene street and Gratiot avenue lines for a single fare of five cents.

(c) It shall arrange for and carry out an interchange of traffic on the Michigan and Gratiot avenue lines, either by transfer of passengers or by running through cars, so that passengers will be carried from any point on either of said roads to any point on the other for a single fare of five cents for one continuous trip.

(d) Such arrangements shall be made by this company that within two months after this ordinance shall have been accepted by said company it shall carry such passengers as shall have taken passage on the cars between the hours of 5:30 o'clock and 7 o'clock in the morning, and between the hours of 5:15 o'clock and 6:15 o'clock in the afternoon over any of its lines in said city for a single fare, to be paid for by a ticket to be sold at the rate of eight tickets for twenty-five cents, for one continuous trip, with all the rights of transfer and through carriages provided for in paragraphs 'A,' 'B' and 'C' of this section."

Record, p. 132.

The last paragraph quoted refers to the sale of tickets commonly known as workingmen's tickets.

An ordinance approved February 4, 1893, as amended February 26, 1895, requires the company to sell these workingmen's tickets on the cars.

Record, p. 134.

This ordinance was not accepted by the company, but its validity was sustained by the Supreme Court of Michigan.

Detroit vs. Fort Wayne, etc., Ry., 95 Mich., 456.

In that case the grant was made in 1865 to a corporation organized under the Tram Railway Act.

The opinion of the court, as delivered by McGrath, J., is in part as follows:

> "The Fort Wayne & Elmwood Railway Company was organized in February, 1865, under chapter 94 of Howell's Statutes. Said act was subject to amendment, and in 1867 the following section was added thereto:
>
> 'All companies or corporations formed for such purposes shall have the exclusive right to use and operate any street railways constructed, owned, or held by them: Provided, That no such company or corporation shall be authorized to construct a railway under this act through the streets of any town or city without the consent of the municipal authorities of such town or city, and under such regulations and upon such terms and conditions as said authorities may from time to time prescribe. Provided, further, That after such consent shall have been given and accepted by the company or corporation to which the same is granted, such authorities shall make no regulations or conditions whereby the rights or franchises so granted shall be destroyed or unreasonably impaired, or such company or corporation be deprived of the right of constructing, maintaining and operating such railway in the street in such consent or grant named, pursuant to the terms thereof.'
>
> The ordinance of 1865, under which said company began operations, contained the following reservation, which is still in force:
>
> 'It is hereby reserved to the Common Council of the City of Detroit, the right to make such further rules, orders or regulations as may from time to time be deemed necessary to protect the interest, safety, welfare, or accommodation of the public in relation to said railway.'
>
> "In the absence of this reservation in the ordinance, it could not be said that the rights and

franchises of the respondent are destroyed or unreasonably impaired by the requirement sought to be enforced; but, independently of this statutory provision, the reservation contained in the ordinance itself, viz., 'to make such further rules, orders or regulations as may from time to time be deemed necessary to protect the interest, safety, welfare or accommodation of the public,' certainly includes the right to enact an ordinance that the company shall, for the accommodation of the public, keep tickets for sale upon its cars. Ordinances containing grants are construed liberally in favor of the public. It cannot be contended that the relation created by the ordinance is contractual, and at the same time that the reservation was of the right to enact police regulations only. The right to exercise police power exists independent of the reservation, and could not be bartered away. The contract is not unilateral, intended as a shield for respondent alone.

"The right of a municipality, under the statute, to refuse its consent to the operation of a street railway in its streets, is an absolute one, and its power, in the first instance, to impose conditions, is unlimited. The nature of the conditions imposed does not depend upon other grants of power. Respecting the imposition of further conditions, after consent given, it is only necessary that the municipality keep within the scope of the reservation."

ORDINANCES REDUCING THE FARE TO THREE AND ONE-EIGHTH CENTS.

An ordinance approved August 16, 1899, reads as follows:

"An ordinance to amend an ordinance of the City of Detroit, approved November 14, 1879, entitled 'An ordinance supplementary to an ordinance entitled "An ordinance to permit certain persons to establish and locate certain railways in the City of Detroit," approved November 24, 1862, and the amendments thereto, and for other purposes,' by adding a new section thereto to stand as section 6a.

It is hereby ordained by the people of the City of Detroit:

Section 1. That the ordinance of said city, approved November 14, 1879, entitled 'An ordinance supplementary to an ordinance entitled "An ordinance to permit certain persons to establish and locate certain railways in the City of Detroit," approved November 24, 1862, and the amendments thereto, and for other purposes,' be, and the same is hereby amended by adding thereto a new section to stand as section 6a, and read as follows:

Section 6a. That the Detroit Citizens' Street Railway Company, its successors and assigns, shall keep on sale on its cars in service at all times tickets to be sold in strips or packages of eight tickets for twenty-five cents, each of which tickets shall be accepted by said railway company, its successors and assigns, for a single ride for any distance in either direction over the lines or routes operated by said railway company, its successors and assigns, on a car on which it is presented, and a passenger presenting such ticket, or upon payment of one single fare charged by said company, shall be entitled to a transfer ticket good for a continuous ride over any other line or route of said company, provided such transfer ticket is presented on the next regular car of such other route within fifteen minutes

after such passenger leaves the car on which he received said transfer ticket.

This ordinance shall not be construed to affect in any manner the line or lines of street railway owned by the Detroit Railway Company.

Section 2. This ordinance shall take immediate effect."

Record, p. 17.

Other ordinances of like import were also passed and approved to reach some of the independent lines acquired by the Detroit Citizens' Street Railway Company.

Record, pp. 18, 21.

The Detroit Citizens' Street Railway Company refused to accept or to abide by these ordinances; and it filed the bill in this cause to have them declared unconstitutional and void on the ground that they impaired the obligations of the contract existing between the company and the City of Detroit.

The question thus presented is the only question in this case.

In the court below the position of the Street Railway Company was sustained.

Record, p. 173.

The city and its Mayor and Corporation Counsel, who were made parties defendant in the bill, perfected an appeal to the Supreme Court of the United States.

Record, p. 174.

I.

The street railway provisions of the Tram Railway Act, as amended in 1861, 1863 *and* 1867, *and the Street Railway Act of* 1867, *are in pari materia, and must be construed together.*

The Street Railway Act of 1867 *is a statutory construction of the prior act; and it expressly confers on the municipal corporations of the State the power to enter into inviolable contracts, fixing the rates of fare to be charged by street railway companies.*

Section 20 of the Act of 1867 unequivocally provides that the rates of fare "shall be established by agreement between such company and the corporate authorities of the city or village where the road is located, and shall not be increased without consent of such authorities."

And Section 29 provides that "All companies *heretofore* organized in this State for the purpose of building and operating street railways under the statutes *then in force* shall have the same powers, rights, protection and privileges and shall be subject to all the liabilities as are hereby provided for companies and corporations organized under the provisions of this act."

The Act of 1867 provided that all future street railway corporations should be organized under it. (Sec. 30.)

These provisions make it certain that the Legislature intended that the Street Railway Act of 1867 was from thenceforth to be the organic law of all the street railway corporations of the State, whether previously organized under the Tram Railway Act, or thereafter organized under the Street Railway Act.

The legislature of 1867 regarded a municipal grant or contract under the Tram Railway Act inviolable as far as the rates of fare agreed upon were concerned, and framed the act of 1867 accordingly, by using clear and unequivocal language to the effect that the rates of fare were to be fixed by agreements or contracts between the municipalities and street railway companies.

The street railway sections of the Tram Railway Act as they were first enacted provided that the "regulations" and the "terms and conditions" were to be prescribed by the local authorities "from time to time;" but as amended in 1867 the local authorities were prohibited from making

any "regulations or conditions whereby the rights or franchises so granted shall be destroyed or unreasonably impaired, or such company or corporation be deprived of the right of constructing, maintaining and operating such railroad in the street in such consent or grant named pursuant to the terms thereof."

The Street Railway Act of 1867 previously passed, at the same session of the Legislature, shows that any disturbance of the rates of fare agreed upon, was to be regarded as an unreasonable impairment of the rights and franchises conferred, for if the rates of fare were to be fixed by the agreement of the parties, and the rates so fixed were not to be increased without the consent of the local authorities, such an agreement was essential to a valid grant, and being made, any interference with the rates by the local authorities could not be regarded otherwise than as an unreasonable impairment of the contract in its most essential and important part. That is to say, the Street Railway Act of 1867, considered in connection with the amendment of 1867 of the Tram Railway Act, completely excludes the view that it was intended to leave the rates of fare open to regulation from time to time, by the local authorities, subject only to the limitation that the rates fixed from time to time should be reasonable rates.

Considering the infantile nature of the street railway business in the State of Michigan at that time, this would be the proper construction of the Tram Railway Act as amended in 1867, even if the Street Railway Act of 1867 had never been passed; but with that act placed at a prior date of the same legislative session, among the laws of the State, there can be no doubt whatever about the construction of the Tram Railway Act as it was finally left by the Legislature of 1867.

The Detroit Citizens' Street Railway Company was organized under the Street Railway Act of 1867, and, as so organized, it has dealt with the City of Detroit.

By ordinances approved October 14, 1892; October 26, September 10 and 17, 1895, it received and accepted direct grants from the City of Detroit.

Record, pp. 135, 136, 137, 138.

The other grants held by it were acquired from street railway companies, some of which were organized prior to 1867 under the Tram Railway Act, and some of which were organized since 1867 under the Street Railway Act of 1867.

What we contend for is this: that no distinction can be made between these grants, and they must all be treated as if they were made under the Act of 1867.

In this connection it must be remembered that after the Street Railway Act of 1867 was passed, viz: November 14, 1879, the Common Council adopted and the Detroit City Railway accepted an ordinance extending the terms and conditions of the ordinance of November 24, 1862, for thirty years from November 14, 1879, and that the right to amend or repeal was to be exercised only in case the company should violate the ordinance.

Record, pp. 121, 122.

This was an adoption and extension of the terms of the old grant after the Street Railway Act of 1867 had become the statutory law governing the municipality and the Detroit City Railway.

II.

The language of Section 20 of the Street Railway Act of 1867, that the rates of fare "shall be established by agreement between such company and the corporate authorities of the city or village where the road is located," is too plain to require or admit of construction or interpretation.

We have been instructed by a careful reading of the opinion of the court as delivered by Mr. Justice McKenna, and the opinion of the dissenting judges as delivered by Mr. Justice White in a recent case from the Supreme Court of Illinois.

Freeport Water Co. vs. Freeport City, 180 U. S., p. 587.

That case involved a construction of the power of municipalities in Illinois to authorize the building of water works for a supply of water "at such rates as may be fixed by ordinance and for a period not exceeding thirty years."

The Supreme Court of Illinois had held that the words "for a period not exceeding thirty years" related to contracts for a supply of water, and did not relate to the rates to be paid therefor, which left the municipalities at liberty

to exercise the power conferred by a general statute of the State authorizing them "to prescribe by ordinance maximum rates and charges for the supply of water."

A majority of the learned judges of the Supreme Court of the United States regarded the decision of the State Supreme Court sufficient to create a doubt about the construction of the statute; and, therefore, to require them to follow the decision of the State court.

Confessedly, the case was peculiar and exceptional. There is nothing in the opinion of the court to support the view that it is to be applied to every State decision construing statutes conferring municipal authority to make contracts.

That is a subject on which the Supreme Court of the United States is still to exercise its own jurisdiction and judgment.

However, the case at bar is radically different and plainly distinguishable.

1. The Legislature of Michigan has never conferred on municipalities any power to fix maximum rates of fare.

2. The Supreme Court of Michigan has never made any decision sustaining any such power, or creating any doubt about the power of municipalities to enter into contracts with street railway companies fixing rates of fare.

III.

It is the settled law of Michigan that municipal corporations, in making grants to street railway, gas and other corporations, for the use of public highways and streets, may enter into irrevocable contracts with the grantees surrendering a portion of their governmental functions.

The nature of these local grants was first determined in a case between the City of Detroit and a gas company.

Maybury vs. Gas Co., 38 Mich., 154.

The City of Detroit claimed that the gas company had forfeited its local franchise, and its city attorney applied to the Supreme Court of the State for leave to file an information in the nature of a quo warranto to enforce the forfeiture.

The opinion of the court is as follows:

> "Campbell, C. J. Leave is asked to file an information in the nature of a quo warranto to deprive the respondent of the franchise, as it is claimed to be, of laying its gas pipes and distributing gas through the streets of Detroit. The ground of the application is that the company has violated some of the terms of an agreement imposing conditions against making combinations with other companies and doing certain other acts, regarded by the City of Detroit as important conditions of its assent to allowing the respondent to use its privileges within the city.
>
> "The statute providing for the incorporation of gas companies allows them to lay pipes through the streets, lanes and squares of any city, town or village where they are located 'with the consent of the municipal authorities of said city, town or village under such reasonable regulations as they may prescribe.' The statutes do not allow an information in such cases as this is claimed to be to be filed without leave, and they contemplate that leave shall only be granted for a plain violation of the laws regulating the corporation, or wrongs amounting to a surrender of its franchises, or 'whenever it shall exercise any franchise or privilege not conferred upon it by law.' (Comp. L., Sec. 7085.)

"The statute contemplates the punishment of corporations for nothing but violations of the laws and policy of the State. In the present instance the State has shown by the incorporating act that public policy is not opposed to and is in favor of allowing gas companies to exist, as they can only exist by having power to lay their pipes. The consent of the municipal corporation is required because the terms on which streets may be safely allowed to be occupied for the purposes of laying gas pipes can be best determined by leaving the regulation to be harmonized with all other exigencies by the authorities controlling their use. The law contemplates that permission will not be unreasonably refused or unreasonably burdened, but regards the municipality as competent to determine the proper conditions for itself.

"The exercise of the power of using streets for laying gas pipes is rather an easement than a franchise, and a similar power is used as often for private drainage and other purposes as for more general purposes. It is a matter peculiarly local in its character, and which should always be to a reasonable extent under municipal supervision to prevent clashing among the many convenient uses to which ways must necessarily be subjected for water, drainage and other urban needs. But the permission to lay these pipes does not differ in any respect from that required for laying railways over land, or ditches through it. *It is not a State franchise, but a mere grant of authority, which, whether coming from private owners or public agents, rests in contract or license, and in nothing else.* A violation of the contract, or an unauthorized intrusion must be redressed as all ordinary wrongs are redressed, by the usual legal remedies. It in no way concerns the State whether the power is granted or withheld, nor whether the corporation has or has not fulfilled its agreements. The injured party has a remedy for any grievance, but the State is no more interested than it would be in the question whether or not a railroad company has lawfully acquired its right of way. This court has heretofore refused to recognize the encroachment of a corporation on a highway as subject to be reached by quo warranto, and we discover no better reason for interfering in the present case.

"The application must be denied."

The foregoing decision has been affirmed in subsequent cases.

People vs. Railway Co., 92 Mich., 522, 524.
Attorney General vs. Railway Co., 96 Mich., 65, 68.

In Michigan, therefore, these local grants do not emanate from the State, through the local authorities as agents of the State. They are not granted by the local authorities acting in their governmental capacity; they are nothing more or less than contracts; and they are to be construed, considered and treated as contracts, just as much as are the deeds, bonds, or other writings obligatory of municipal corporations.

The power of taxation is the highest power possessed by governments. Without it none of the other powers of government could be exercised, yet the Supreme Court of Michigan has on two different occasions sustained the power of the City of Detroit to make the contract relative to taxation contained in the ordinances of November 14, 1879, and January 1, 1887, granted to and accepted by the Detroit City Railway. (Record, p. 128.)

Detroit vs. Railway Co., 76 Mich., 421.
Detroit Citizens' Street Ry. Co. vs. Common Council of Detroit, 85 N. W. Rep., 96; on rehearing, 86 N. W. Rep., 809.

In the first case the City of Detroit brought an action to recover general city taxes from the company on the theory that the ordinance of January 1, 1887, and the prior one of November 14, 1879, so far as they related to taxation, were invalid.

In the other case, also, the direct question of the validity of the agreement as to taxation was involved, and it was sustained. On a motion for a rehearing, the court, in an opinion filed July 2, 1901, by Mr. Justice Hooker, went over the subject again. As the opinion is short and conclusive, we insert it in full.

"Hooker, J. This cause is before us on rehearing, 85 N. W., 96. At the time the city authorized the building of these railroads, the policy of the State was to collect a specific tax in lieu of other taxes. At the same time the Legislature so far modified this rule, that it permitted the city to contract for the payment of local taxes, as a condition to the building of the roads. City of Detroit vs. Detroit City Ry. Co., 76 Mich., 425; 43 N.

W., 447. When made, that was a binding contract on the city for the period which the company was authorized to use the streets. Neither party could change it without the consent of the other. In 1882 the policy of the State was changed, and the provisions relating to the specific tax were repealed, and thenceforth State and county taxes were levied in accordance with the rule pertaining to other property. But this could not affect existing contracts, and the railways theretofore organized had the right to pay local taxes on the basis of such contracts. The City of Detroit made the repeal of the law providing for the specific tax a ground for claiming the right to ignore the contract in relation to city taxes, and dissensions arose, which led to a new arrangement. Thus, in 1887 the Detroit City Railway consented to an adjustment of this controversy by accepting a new ordinance; and this was passed upon in the case of City of Detroit vs. Detroit City Ry. Co., 76 Mich., 422; 43 N. W., 447. In 1885 the same thing had been done in the case of the Grand River Street Railway, and the tax has since been paid on the basis of that arrangement. Now the city is again insisting upon a right to ignore its contract and increase the tax upon this property. We passed upon the question in our original opinion, but counsel ask a rehearing upon the ground that we overlooked the fact that the ordinance of 1887 relating to the Detroit Citizens' Railway and that of 1885 relating to the Grand River are not identical in terms. Both had contract rights that were invulnerable under their original franchises. Both undertook to adjust controverted rights by accepting new ordinances, making new contracts, which this court in the case cited has held might be done. The second of these readjustments contained the provision: 'The above mentioned percentage payments and the tax on lands provided to accrue from January 1, 1887, to the end of the franchise of said railway, shall be paid by the said railway and received by the city in lieu and discharge of all taxes, license fees, and charges of any kind against the property, capital stock, rights and franchises of said company which have been or may be levied, assessed or imposed under any present or future law or authority.' That relating to the Grand River Rail-

way was less specific. It provided for an increased tax on gross receipts. It took the place of a former contract. It contained the provision that, 'said specific tax shall be in lieu of license and other taxes and charges under existing ordinances: Provided, that this shall not in any manner affect the obligations of said company in the matter of paving or repairing pavements as required by existing ordinances.' Had the words 'under existing ordinances' been omitted, there would probably be no claim that the case would not be within the decision of City of Detroit vs. Detroit City Ry. Co., 76 Mich., 425; 43 N. W., 447. The only city taxes collectible were those provided for by existing ordinances. No others could be imposed, except by consent of the railway company. They did not consent, but it was upon the condition that the new tax agreed upon shall be in lieu (i. e., should stand in place of) the pre-existing tax. This did not mean in part, but was a full substitute for the previous contract obligation. The city of Detroit had granted contract rights which it disputed, and a compromise was made, and new contract rights were created. The effect of counsel's contention is that notwithstanding this new arrangement, and the controversies that the parties sought to settle by it, the new contract really settled nothing, and left the council the right to increase the tax at will, by a new ordinance, which might take effect as soon as the same could be adopted. The question was not overlooked. We adhere to the opinion already expressed—that the city must accept taxes under this contract. The motion for rehearing is denied. The other justices concurred."

With such a decision by the State Supreme Court, made since this cause was decided in the court below, before us, there is no existing basis or premises on which the Supreme Court of the United States can reach the conclusion that it was not within the power of the City of Detroit to make an irrevocable contract with the Detroit City Railway and its assigns fixing the rates of fare to be charged during the period the right to make use of the streets was granted.

The fixing of rates of fare by contract is an alienation of the police power. The fixing of rates of taxation by contract is an alienation of the power of taxation. The police power is not more sacred or more inalienable than the power of taxation.

The power to fix rates of fare by contract may be properly regarded as included within, or as a necessary concomitant of, or corollary from, the power to fix rates of taxation by contract.

A demonstration of the existence of a power to fix rates of taxation by contract is a demonstration of the existence of the power to fix rates of fare by contract.

IV.

The fact that the exclusive privilege to build street railways in Detroit attempted to be granted by the ordinance of November 24, 1862, was invalid, in the judgment of the Supreme Court of Michigan, and of the Supreme Court of the United States (171 U. S., 48), *is a conclusive reason why the contract fixing the rates of fare should be held to be irrevocable.*

If the Common Council had intended to reserve the power to regulate, from time to time, the rates of fare, the greatest objection to the exclusive privilege would have been removed. The main, if not the only, object of keeping the city open to the competition of other companies was to enable the city to obtain from them lower rates of fare.

The fact that the rates of fare were irrevocably fixed, was the very element of the contract which made the exclusive privilege attempted to be granted, obnoxious, and of such a character as not to be within the power conferred on the local authorities by the statute.

If the rates of fare were to be subject to regulation by the Common Council, the exclusive privilege would have been altogether harmless, and it would have been a benefit to the city and the public instead of a detriment or injury.

An exclusive privilege or franchise cannot be regarded as objectionable, and beyond the powers of the municipality, if it is not of itself of such a character as to operate as a restraint of, or restriction upon the municipal authority over the subject matter.

With the rates of fare subject to be regulated according to the varying conditions of business and population, there would be no apparent reason why the city could not deal with the Detroit City Railway or its assigns for new routes, and extensions of old routes, as safely and satisfactorily as with other street railway companies.

The exclusive privilege being held to be invalid, it follows, as a matter of course, that the contract fixing the rates of fare, was and is to be regarded as valid and irrevocable.

The exclusive privilege case referred to is that of the Detroit Citizens' Street Railway Company vs. The Detroit Railway, 171 U. S., 48.

Mr. Justice McKenna, delivering the opinion of the court in that case, said:

> "It is clear that the statute did not explicitly and directly confer the power on the municipality to grant an exclusive privilege to occupy its streets for railway purposes. It is urged, however, that such power is to be inferred from the provision which requires the consent of the municipal authorities to the construction of a railway under such terms as they may prescribe, combined with the provisions of the constitution, which, if they do not confer a power independent of the Legislature, strongly provide for and intend local government. The argument is strong, and all of its strength has been presented and is appreciated, but there exist considerations of countervailing and superior strength. That such power must be given in language explicit and express, or necessarily to be implied from other powers, is now firmly fixed. There were many reasons which urged to this—reasons which flow from the nature of the municipal trust—even from the nature of the legislative trust, and those which, without the clearest intention explicitly declared—insistently forbid that the future should be committed and bound by the conditions of the present time, *and functions delegated for public purposes be paralyzed in their exercise by the existence of exclusive privileges.*"

After referring to a number of authorities, the learned Judge concluded as follows:

> "Easements in the public streets for a limited time are different and have different consequences from those given in perpetuity. Those reserved from monopoly are different and have different consequences from those fixed in monopoly. *Consequently those given in perpetuity and in monopoly must have for their authority explicit permission, or, if inferred from other powers, it is not enough that the authority is convenient to them, but it must be indispensable to them.*"

Here we have positive proof that the other monopolistic elements of the grant were the controlling reason for the decision of the court, that the exclusive privilege was not within the powers of the municipality.

These monopolistic features were:

(1) Permission and authority to construct and operate street railways on certain specified streets.

(2) Immunity from taxation except at certain agreed rates.

(3) Authority to charge certain fixed tolls or fares.

The existence of these most characteristic elements of the grant having been established in a case between the same parties for the purpose of showing that the power to confer an exclusive privilege must be rejected because not indispensable to the power to make the grant, it cannot now consistently be held, that they do not exist, and that there was no basis or groundwork for the prior decision.

Authority to make use of streets for the purposes of a street railway would be an idle and worthless right unless the grant was accompanied with authority to charge fares or tolls. Power to make the grant carries with it the power to agree upon the fares or tolls to be charged. No other kind of grant would ever be accepted by anybody; and therefore power to fix the rates of fare by con-

tract is indispensably coupled with the power to make the grant.

The street railway act of 1867 was in force when the ordinance of November 14, 1879, extending the life of the grant was passed by the Common Council and accepted by the company; and that act expressly declares that the rates of fare "shall be established by agreement between such company and the corporate authorities of the city or village where the road is located."

V.

The reservation made by Section 19 of the ordinance of November 24, 1862, to the Common Council of "the right to make such further rules, orders and regulations as may from time to time be deemed necessary to protect the interest, safety, welfare or accommodation of the public in relation to said railways," was not intended to apply, and does not apply, to taxation or rates of fare.

The power reserved is of the same nature as that reserved by section 19 of the street railway act of 1867 to make further rules and regulations in regard to grading, paving and repairing the streets, etc.

In 1891 an agitation for three cent street railway fares was started in the City of Detroit. To accomplish that result, litigation was commenced by the city against the Detroit Citizens' Street Railway Company to have the ordinance of November 14, 1879, extending the grant of the Detroit City Railway for thirty years from that date, declared void, on the ground that the Common Council had no authority to make a grant beyond the life of the corporation to which it was made.

The position of the city was sustained by the United States Circuit Court for the Eastern District of Michigan in an opinion by Taft, Circuit Judge, Swan, District Judge, dissenting.

> Detroit vs. Detroit Citizens', etc., Co., 60 Fed. Rep., 161.

On appeal to the United States Circuit Court of Appeals for the Sixth Circuit, the decree of the Circuit Court was reversed.

> Detroit Citizens', etc., Co. vs. Detroit, 22 U. S. Appeals, 570.

The late Mr. Justice Jackson of the Supreme Court of the United States participated in this decision. At p. 600 the court say:

> "The power to make an irrevocable contract, giving an easement of some considerable duration, is an inseparable incident in any scheme for furnishing such public facilities as a street railroad. The duration of such grants must be a question of discre-

> tion to be exercised by some public authority. That the exercise of that discretion should be left to the local government, as a question of purely local interest, seems most consistent with the proprieties of the case, and most in accord with the decentralizing policy so peculiar to the State of Michigan."

The Supreme Court of the United States refused to grant a certiorati to review the decision of the Court of Appeals.

The city endeavored to reopen the litigation in the State Courts, but the Supreme Court of Michigan, January 22, 1895, held the decision of the United States Court of Appeals to be final.

Detroit vs. Attorney-General. 103 Mich., 612.

The litigation thus came to an end. During the time it was in progress and for a number of years afterwards no one in the City of Detroit claimed that the common council had power to fix street railway rates of fare.

It was not until August 16, 1899, that the three cent ordinances in question in this case were passed.

The theory of municipal power on which they are based is evidently an afterthought on the part of the City of Detroit, to which it was brought by the defeat it received in the litigation to which we have referred.

The truth is that from 1862 to 1899 the City of Detroit as well as the Detroit City Railway and its assigns have treated the rates of fare fixed by the ordinance of November 24, 1862, as irrevocable by the city, and an inviolable part of the contract between the parties.

The legislature entertained the same view when it framed the Street Railway Act of 1867, for it is not reasonable to believe that it contemplated there should be such a radical difference between that act and the Tram Railway Act.

In construing contracts, the courts endeavor to arrive at the intention of the parties. With that object in view it is not possible to reach the conclusion that the rates of fare agreed on were not to be irrevocable.

VI.

As a business proposition, the theory that the rates of fare were to be reasonable under common law rules enforced by ordinances passed from time to time by the Common Council is not consistent with the subject matter of the contract and the relations of the parties to it.

Detroit was a growing and progressive city, and desired street railways, which were not to be remunerative investments for a number of years. The parties agreed to a limitation on the fares to be charged so that they could not exceed five cents for each passenger, which excluded any greater rate, if a fare of five cents was found to be unreasonably low. The business theory was that while remunerative and compensatory fares were not to be expected during the earlier years of the grant, they would be forthcoming during the later part of the grant.

This is the financial history of nearly all enterprises in the west involving large investments. Where the municipality as the representative of the public has had the benefit of the contract during the primitive and experimental stage of the improvement bargained for, it is nothing less than repudiation, for the municipality to refuse to be bound by the contract, when it has become valuable to the other contracting party.

VII.

The proposition that the rates of fare were irrevocably fixed for the period covered by the grant is in no sense a violation of the common law obligation of the street railway company to carry passengers for a reasonable fare.

The question what is a reasonable fare is necessarily a somewhat difficult one. What may be reasonable at one time may not be at another. The municipal authorities under the laws of Michigan represent the public, and when they agree to a rate of fare for a considerable period of time, it is to be presumed that the rate so fixed is regarded as reasonable when the whole period to be covered by it is considered.

The contract of the parties merely settles the question for the period agreed upon; and it precludes any dispute or controversy over the question for that period.

It might be more wise in an old and firmly established community to leave the question of reasonableness open to be fought over from time to time as the varying conditions of population, trade and business might arise; but in new and growing cities and villages desiring street railway facilities as a means of growth and development, it has very generally been found expedient to settle the question by contract.

In that way the cities and villages of Michigan and of most of the western states and many of those of the eastern states, have first obtained their street railways, water works, and gas works, and to now learn that the contracts so made are invalid would produce the most serious results, and be a greater injury to the municipalities of the country than to hold them to the contracts they have so generally and publicly entered into as inducements to investments in that kind of property.

VIII.

The fact that the original ordinance of November 24, 1862, *and the ordinance of November* 14, 1879, *extending, as modified, the terms and conditions of the grant, were each limited to thirty years from their respective dates, shows that the rates of fare agreed upon were to be irrevocable during these periods of time.*

We again quote the concluding paragraph of the opinion of the court in the exclusive privilege case, 171 U. S., 48, 55:

> "*Easements in the public streets for a limited time are different and have different consequences from those given in perpetuity. Those reserved from monopoly are different and have different consequences from those fixed in monopoly.* Consequently those given in perpetuity and in monopoly must have for their authority explicit permission, or, if inferred from other powers, it is not enough that the authority is convenient to them, but it must be indispensable to them."

These words certainly and clearly assume as the basis of the judgment of the court, that the grant to use the streets was given in perpetuity, and that the terms and conditions under which the grant was to be exercised were agreed upon for thirty years only.

In other words, that the parties contracted on the theory that the operation of the roads was not to cease at the end of the thirty years, but that the parties would agree anew upon terms and conditions, or in default of a mutual agreement, the street railway company or its assigns could continue to operate the roads upon such terms and conditions as the common law and statutory obligations of the company might impose upon it.

We believe this to be a correct statement of the rights of the parties, but in view of the attitude of the authorities and inhabitants of the City of Detroit on this question for the last ten years, we doubt very much whether any such view of the case will be conceded by the very able and learned corporation counsel on the argument of this cause.

Whatever may be the final outcome of this question—and it should not be disposed of as a mooted question—

it is apparent that when the parties agreed upon the terms and conditions imposed by the ordinance of November 14, 1879, they fully understood that the terms and conditions were to be irrevocable for thirty years.

This is very strongly indicated by the provision of the ordinance of November 14, 1879, that

> "The right to amend or repeal this ordinance in case of its violation by the company is expressly reserved."

While the power reserved by Section 19 of the ordinance of November 24, 1862, was continued in force for such mere rules and regulations of the common council as should not interfere with the substantial terms and conditions of the grant, it was modified, if it ever had any greater meaning, by the later ordinance.

That the ordinance of November 14, 1879, did modify the ordinance of November 24, 1862, in some respects other than in the matters of taxation and paving has been established by the Supreme Court of Michigan.

> People vs. Detroit Citizens' Street Ry. Co., 116 Mich., 132.

Section 4 of the ordinance of November 14, 1879, concludes with these words:

> "And it is hereby stipulated and agreed that the cars on all lines subject to this ordinance shall be operated as the public convenience may require and the common council order."

It was held that this clause abrogated the limitation on the powers of the common council contained in Section 7 of the ordinance of November 24, 1862, to the effect that the common council should not require the company to run its cars oftener than once in twenty minutes.

> Record, pp. 29, 35, 36.

At the time of the extension of the ordinance of November 24, 1862, it had thirteen years to run, and in consideration of the modifications agreed upon, the contract was extended for seventeen years beyond the thirty years fixed by the ordinance of November 24, 1862, that is for thirty years from November 14, 1879.

Unless the terms and conditions were to be mutually binding for that period, the contract of the parties is incomprehensible.

Why such particularity of detail as to all the essential elements of the contract, if the exact and precise terms agreed to were to have no binding force or efficacy; and if the common council was to have a reserved power to regulate the rates of fare, why should a time limitation be made a part of the agreement?

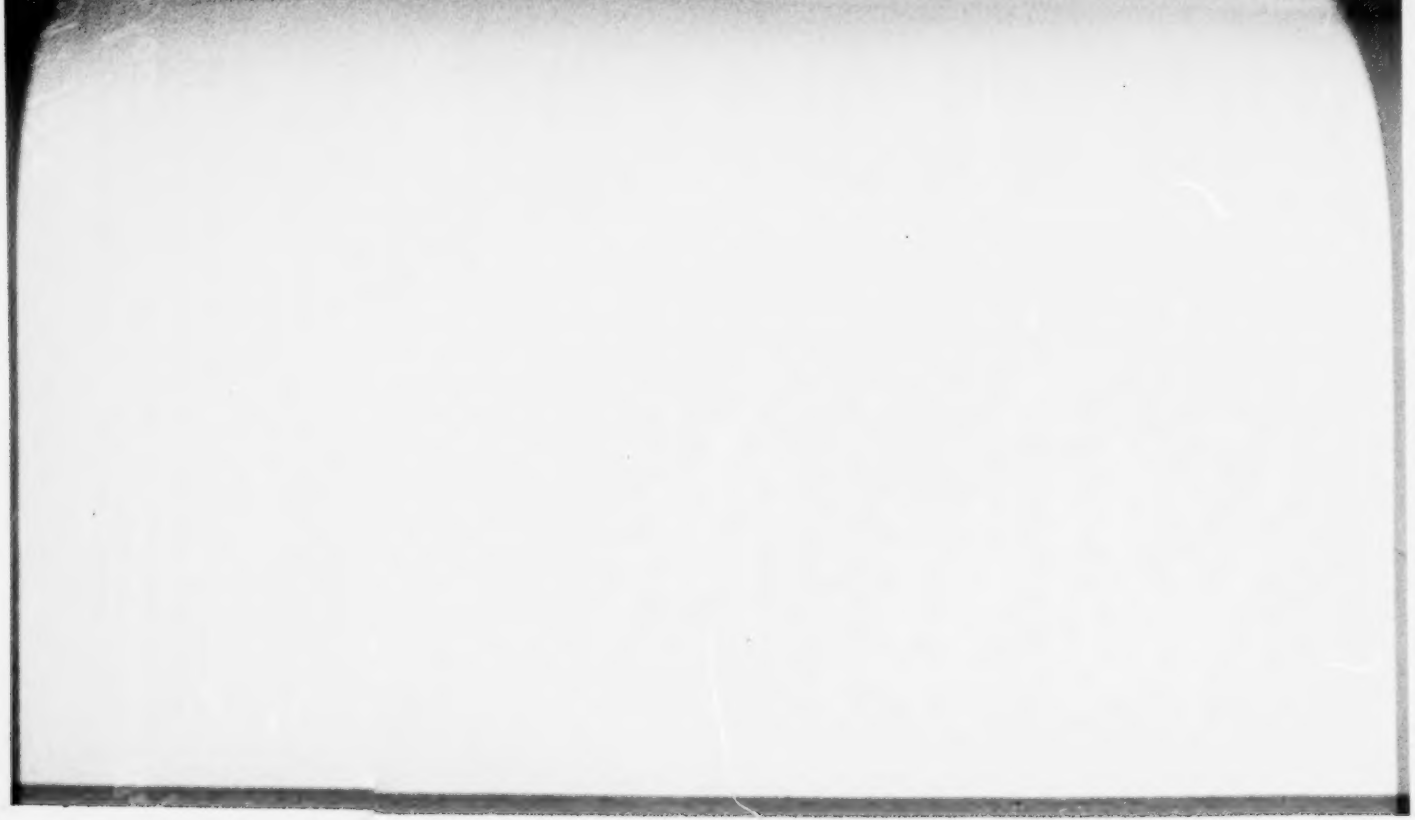
These are pertinent questions.

As there are no State decisions to the contrary to which consideration must be given, and deference be paid, we submit that the contract should be construed according to the plain understanding of the parties to it.

We have prepared this brief without any intention of writing an essay on street railway law, or of citing any more authorities than were necessary to illustrate and set forth in plain view, the exact questions involved in the case.

We respectfully submit that the decree below should be affirmed.

FRED A. BAKER,
Counsel for Appellee.



152.

Add'l Brf. of Defendants & Appellants

for Appellee.

Filed Oct. 28, 1901.

Supreme Court of the United States.

OCTOBER TERM, 1901.

No. 152. In Equity.

THE CITY OF DETROIT, WILLIAM C. MAYBURY, MAYOR; CHARLES FLOWERS, CORPORATION COUNSEL, DEFENDANTS AND APPELLANTS,

vs.

THE DETROIT CITIZENS' STREET RAILWAY COMPANY, COMPLAINANT AND APPELLEE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN.

ADDITIONAL BRIEF OF M. BRENNAN AND JOHN C. DONNELLY FOR APPELLEE.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 1073

Supreme Court of the United States.

OCTOBER TERM, 1901.

No. 152.

THE CITY OF DETROIT, WILLIAM C. MAYBURY, MAYOR; CHARLES FLOWERS, CORPORATION COUNSEL, APPELLANTS,

vs.

THE DETROIT CITIZENS' STREET RAILWAY COMPANY, APPELLEE.

ADDITIONAL BRIEF FOR APPELLEE.

It is proposed herein to discuss some of the legal propositions advanced in the briefs already filed. The facts are quite fully and accurately set forth in the other briefs, and therefore no extended reference will be made thereto.

The questions of law we will discuss are:

First. Under the terms of the tram railway act the city has not the power to enact the ordinances of August 16, 1899, compulsorily reducing rates of fare and requiring transfers to other routes for one fare.

Second. The provisions of the street railway act take the fixing of the rates of fare for carriage of passengers on street railways from the domain of legislative or governmental authority, so far as the municipality is concerned, and places it wholly within domain of contractual authority. Its provisions fix the exact measure and mode of exercise of the power of the city in the matter, and by express language its protection is extended to all existing companies.

I.

For convenience we will again briefly state the history of the sections of the train or tram railway act under which the original and first grants were made by the city to the companies. As at first adopted the tram railway act applied solely to corporations organized thereunder for the carriage of goods and merchandise, but in 1861 the legislature added what stands as section 33, which then read and now reads as follows:

> "It shall be competent for parties to organize companies under this act to *construct* and *operate* railways in and through the streets of any town or city in this State."

At the same time the legislature adopted what then stood as section 34, which as then adopted read as follows:

> "All companies or corporations formed for such purposes shall have the exclusive right to use and operate any street railways constructed, owned or held by them, provided that no such company or corporation shall be authorized to *construct* a railway under this act through the streets of any town or city without the consent of the municipal authorities of such town or city, and under such regulations, and upon such terms and conditions as said authority may from time to time prescribe."

The law stood thus when the parent street railway companies were organized, and the first grants of rights to construct railways in the streets were made. These sections remained unamended until 1867, when the legislature amended section 34 so that it reads as follows:

> "All companies or corporations formed for such purposes shall have the exclusive right to use and operate any street railways constructed, owned or held by them, provided that no such company or corporation shall be authorized to construct a railway under this act through the streets of any town or city without the consent of the municipal authorities of such town or city, and under such regula-

tions, and upon such terms and conditions as said authorities may from time to time prescribe. *Provided further*, That after such consent shall have been given and accepted by the company or corporation to which the same has been granted such authorities shall make no regulations or conditions whereby the *rights or franchises so granted* shall be destroyed or unreasonably impaired, or such company or corporation be deprived of the right of constructing, *maintaining and operating* such railway in the street in such consent or grant named *pursuant to the terms thereof*."

The provisions of this act and those of the street railway act proper, to which more extended reference will be hereafter made, are the only legislative sources from which the city draws its power to deal with the street railway matter. Neither at the time the grants were made nor at any time since then has there been any provision in the city charter relating to the subject-matter of street railway grants, and any general authority which the city may be said to possess under the charter is derived solely from that provision giving it the control of the streets and highways and the use thereof. This much is decided in direct terms by the Federal court of appeals for the sixth circuit in Detroit City Railway *et al. vs.* The City of Detroit (64 Fed. Rep., 628).

Thus considered, the provisions of the tram railway act quoted have a two-fold character:

(*a.*) It is a grant of power to the city to consent to the construction of a street railroad in any street of the city.

(*b.*) It is a grant of authority to individuals to acquire the franchise of being a corporation, and as a corporation to possess and enjoy the additional franchise of constructing and operating a street railway for the carriage of passengers for hire.

They were so treated and interpreted by the court of appeals in the case above cited, and our contention is that the sections as they stood prior to the amendment of 1867 did not declare the legislative intention that the city should have the power of independently legislating upon the right of the company to exercise its franchise to operate a street railroad for hire, and that if the sections as they were originally adopted were susceptible of a construction which

would give to the city that power at that time, the amendment of 1867 effectually withdrew that power from the city.

Considering section 34 in its character of a grant of power to the municipality, we must treat it in the light of the well-settled rule that as to municipal corporations their charters are not contracts, and so far as the extent, character, and duration of their powers are concerned they are wholly subject to the will of the State, and such power may be increased, diminished, modified, abolished, or withdrawn at the legislative will. This is more aptly stated by this court as follows:

> "Municipal corporations are created by the legislature, and they derive all their powers from the source of their creation; and these powers are at all times subject to the control of the legislature. Such powers also, in the absence of any constitutional regulation forbidding it, may be enlarged or diminished, extended or curtailed, or withdrawn altogether as the legislature may determine."

It is stated in Booth on Street Railways in the following language:

> "The legislature may by general act alter or amend charters of municipal corporations whether granted by general or special act; and such alteration will affect and control their powers with reference to corporate franchises previously granted."

Under this doctrine the power of a municipality over any given subject-matter must be measured according to the terms of the charter or other legislative grant or act as it stands at the time the exercise of the power is attempted. This has been expressly declared in a comparatively recent street railway case in Michigan, and the extent to which this doctrine is carried is well illustrated by the decision of this court in New Orleans *vs.* New Orleans Water Works (142 U. S., 79).

It is claimed by the city that when the grant was made to the Detroit city railway, in 1863, a fair interpretation of section 34 of the act as it then stood shows an intent upon the part of the legislature to confer upon the city the authority from time to time to regulate the exercise of the fran-

chise which the company received from the State of the right to operate a street railroad for the carriage of passengers for toll or hire, independently of and without attaching the same as a condition to any consent contemporaneously made for the construction of a street railway in some street of the city. Necessarily this claim must be supported by the further claim that this authority has never been modified or withdrawn, either by the amendment of 1867 or by any of the provisions of the general street railway act, which is *in pari materia* with the street railway provisions of the train railway act, and was passed at the same legislative session as the amendment of 1867. Our contention is that neither the provisions of section 33 or 34, as they stood in 1863, nor those sections, as amended in 1867, conferred upon the city any such extraordinary power as that claimed. The language of these two sections will not, in our opinion, bear such an interpretation, and we invite the attention of the court to a careful reading thereof.

Section 33 provides that companies may be formed under the act to *construct* and *operate* street railways in the streets of towns and cities. It will be noted that the term "construct" and the term "operate" are both employed in this section, and, as was pointed out by the court of appeals in the case cited, they must be considered as separate and distinct grants of authority, in view of the provisions of the next section. When we examine section 34, as it stood in 1863, we find the language to be:

> "All companies or corporations formed for such purposes shall have the exclusive right to *use* and *operate* any street railway constructed, owned or held by them, provided that no such company or corporation shall be authorized to *construct* a railway under this act through the streets of any town or city without the consent of the municipal authorities of such town or city."

It will thus be seen that the power of the municipality to prescribe terms and conditions from time to time was limited to terms and conditions upon which the road might be constructed as distinguished from terms and conditions that affected the right of the company in the exercise of its franchise to operate the road for tolls, and the point we are

endeavoring to make in thus calling attention to the specific language, and the variation between the language contained in section 33, conferring the legislative franchises, and that used in section 34, is that the legislature did not intend that the city should have any power of a legislative character to regulate, independent of the company and independent of any consent to construct a street railway, the exercise of the franchise of operating the road and collecting tolls. The distinction between the two rights and the relative distribution of authority to regulate them as between the State and the city, and the extent of the power conferred upon the city by the legislature by the terms of section 34, are clearly pointed out and emphasized in the decision in the case above referred to, which involved the validity of this very contract. The argument of the counsel for the city in that case was that the franchises possessed by the Detroit city railroad, viz., the corporate franchise, the franchise of operating a street railway for hire, and the franchise to construct, only became operative upon the company obtaining the consent of the city to occupy a street with its tracks. Coming to the discussion of this subject, the learned court says (p. 640):

> "We must begin with the observation that it is an error to assume that under either of the street railway acts the operativeness of any of the franchises conferred upon street railroad companies is made dependent upon the consent of municipalities. The power to consent is not a power of consent to the operation or vitality of the charter franchises. The consent which the city is to give is a consent to the construction of any such road in its streets."

After discussing some of the reasons which appeared to influence the lower court in reaching an opposite conclusion, and referring to the language of the sections, the learned court continues (p. 641):

> "To the practical operation of a street railway three things were essential under the law of Michigan. These were:
>
> "First, corporate capacity; this because under the law of that State there seems to have been no provis-

ion by which natural persons could directly acquire the other requisite franchises.

"Second, a franchise to operate the road and take tolls.

"Third, a right to occupy particular streets with the necessary tracks and equipments.

"These three requisites are *distinct and separable.* The first two are essential franchises which could only come from the State. The third and equally essential requisite could not come from the State, and if acquired at all must come from the municipality within which it was proposed to exercise its substantial franchises."

Speaking further, on page 642, the court says:

"It is evident that the legislature could not grant to any street railway the right to construct and operate its road upon any particular street. It may provide for the incorporation of such companies and endow them with the franchises necessary. For the necessary street right they must be referred to the only authority which can grant such privileges, the local government of the municipality in which it is proposed to operate such road. It may confer power upon all such municipalities to grant or withhold such *easements.* The right to make such grants may be conferred subject only to such terms and conditions as the municipality may impose, or it may surround the power with such limitations as it shall deem wise."

Further, on page 643, he says:

"The just, reasonable and fair interpretation of the provision in each act requiring consent is that nothing in either act shall be construed as authorizing any such road to occupy the streets of any city with its tracks and cars without first obtaining from such city the *right of way necessary,* which right may be granted by the city upon terms and conditions satisfactory to it, and acceptable to the company, and that this consent to such construction and occupancy shall not be subject to repeal or alteration when granted and accepted."

Further, on page 643, the court says:

> "The power to consent is in and of itself the power to *grant an easement. The consent is an easement*, and the act of consenting to the use of the streets for railway purposes is the act of *granting an easement* in the streets. Consent to such use of the streets constitutes a *typical easement, and the right granted thereby is an interest in realty, being an incorporeal hereditament.*"

Later on he states:

> "Now, if it (the legislature) had granted the right to enter upon a particular street and occupy it for such purposes without in terms mentioning the consent of the city, it will be agreed that there was an implied power granted the city authorizing it to consent; but when as in these two acts it is expressly provided that the consent of the city must be first obtained, and then the legislature proceeds expressly to state how that consent shall be given—that the terms and conditions must be such as are satisfactory to the city, and that after such consent has been given and accepted, the right, franchise or easement shall not be destroyed or unreasonably impaired by any regulation or conditions to be made thereafter by the city—it seems too obvious for argument that a power is expressly given."

Again he says:

> "Our conclusion upon this branch of the case is that the legislature meant by the term 'consent' no more and no less than would be meant *by right of way, or easement.* '*Consent*' in the connection used *is synonymous with easement or right of way.*"

These quotations from the opinion of the court of appeals, and many other sentences and statements contained therein which might be quoted, clearly show that that court had in mind the clear distinction between the subject-matter over which the city was given power and the matter of the regulation of rates of fare. They state over and over again that

a power was granted to the city by these acts, and as often state the power to be not the power to independently regulate rates of fare, but the power to grant an easement. As pointed out by that court, the franchise of being a corporation and the franchise to operate a road for tolls are franchises and rights granted directly by the State to the corporation, and are of such a character that the municipality could not grant them, and the operativeness of which, to use the language of the court, did not spring from any consent upon the part of the municipality. If the municipality could not grant either under the terms of the tram railway act or from lack of capacity in the legislature to confer the authority upon it to grant the franchise of operating a street railroad and collect tolls therefor, it does not seem reasonable that the legislature should have intended that that franchise which it alone could and did grant should be subject to the independent legislation and control of the municipality.

The third essential to street railroad operation in Michigan pointed out by the court, viz., the right to occupy any particular street with a track, was one which did depend upon the consent of the municipality, so far as any particular street was concerned, and it is evident that that was the subject-matter which the legislature intended should be left to the jurisdiction of the municipality; and while in the exercise of that jurisdiction the municipality might insist, as a condition of its consent, that a limit should be placed upon the rate of fare to be charged, still it does not follow that the city would have the power by independent enactment, not conferring any new street rights, and long after the railway was constructed according to the terms of the original consent, to regulate the rates of fare to be collected by the company in the exercise of the franchise which it received from the State.

The power given the city to regulate was the power to regulate the extent, mode of use, and enjoyment, location, and character of the franchise or easement which the company should receive and which the city could grant, and not the power to regulate, curtail, limit, or destroy the franchise directly granted by the State, viz., the franchise of carrying passengers for hire on the road when constructed.

And so we say that under the section as it stood in 1863 such regulations, terms, and conditions as the municipal au-

thorities might prescribe from time to time must be confined and have reference to the question of construction alone.

We must not be understood as here claiming that the legislature could not by express enactment confer the power upon the city to enter into an agreement with the company fixing the maximum rate of fare. What we do contend for is that, by a fair interpretation of the provisions of the tram railway act as they stood up to 1863, no such power was conferred upon the municipality, but, on the contrary, the power conferred upon it was limited to dealing with the question of construction.

2. But treating the matter as one left in doubt, and possibly a doubt which could be resolved in favor of the view of the city as to the proper construction of section 34 of the tram railway act, as it stood when the grants in question were made, we cannot conceive how there can be any doubt as to the extent of the city's power after the amendment of 1867. Bearing in mind that the only right or franchise which the city had the power to *grant* under the act was the franchise or easement in the street, we are aided at arriving at the intent and meaning of the legislature in adding the proviso of 1867 to section 34. The language is as follows:

> "That after such consent shall have been given and accepted by the company or corporation to which the same is granted such authorities shall make no regulations or conditions whereby the *right or franchise so granted* shall be destroyed or unreasonably impaired."

Under the decision of the court of appeals, what right or franchise is GRANTED by the city? As pointed out, the only right or franchise granted by the city is the easement in the street, and, so far as that easement is concerned, the legislature in the proviso has said that the municipal authorities shall make no regulations or conditions whereby that easement shall be destroyed or unreasonably impaired. But the legislature goes still further and says that after the consent shall have been given and accepted by the company the city authorities shall make no regulations or conditions whereby such company or corporation shall be deprived of the right of *constructing, maintaining, and operating* such rail-

way in the street in such consent or grant named, *pursuant to the terms thereof.* It would seem as though the legislature clearly recognized the two classes of franchises in this provision: (1) The franchise or easement in the street granted by the city. This they said should not be destroyed or unreasonably impaired. (2) The franchise of maintaining and operating a railway for hire, which, as pointed out by Judge Lurton, was a franchise which emanated from the State alone, and as to this franchise the municipality was prohibited from making any regulation or condition which would deprive the company of the absolute right to maintain and operate the railway in the street in the consent or grant named according to the terms of the grant itself. Therefore, if the maximum rate of fare fixed by the grant was one of the terms or conditions attached to the exercise of the franchise of operating the road, then any attempt of the city to reduce that rate of fare without the consent of the company was a deprivation of the right of the company in violation of the terms of the statute as completely as though the city had undertaken to require them to carry passengers for no fare. And certainly the requirement that they should give two rides for one fare was a clear violation of the terms of the grant. We are not without extrinsic but potent aids in learning what the legislative intention was in the enactment of the proviso of 1867. At the same session of the legislature, and but a few days prior thereto, that body enacted a comprehensive law for the incorporation of street railway companies proper, and for the regulation of the business of constructing, maintaining, and operating street railways in the streets of the cities of Michigan. Section 20 of that act provided as follows:

> "The rates of toll or fare which any street railway may charge for the transportation of persons or passengers over their road shall be established by agreement between such company and the corporate authorities of the city or village where the road is located, and shall not be increased without consent of such authorities."

Section 14 of the act provided:

> "After any city or village shall have consented as in this act provided to the construction and main-

> tenance of any street railways therein or granted any rights and privileges to any such company, and such consent and grant have been accepted by the company, such township, city or village shall not revoke such consent, nor deprive the company of the rights and privileges so conferred."

Section 29 of the act provided as follows:

> "All companies or organizations heretofore organized in this State for the purpose of building and operating street railways under the statutes then in force, shall have the same powers, rights, protection and privileges, and shall be subject to all the liabilities as are hereby provided for companies and corporations organized under the provisions of this act."

Section 30 provided as follows:

> "All companies and corporations hereafter formed for the purpose of constructing, owning, or using any street railway for the transportation of persons or passengers in any city or village shall be organized under the provisions of this act, and shall be subject to the provisions of chapter 73 of the Compiled Laws of this State, and to all other general laws of this State relating to corporations, so far as the same may be applicable to corporations formed under this act, and the legislature may alter or amend or repeal this act at any time."

It is evident from the provisions quoted that the legislature clearly had in mind, among other things: (1) That after the city or village should consent to the construction and maintenance of a street railway in its streets, and the same was accepted by the company, the same became a binding contract in all respects, which the city could not revoke, or so treat as to deprive the company of any of the rights or privileges conferred thereby. (2) That the power of the city to deal with the question of rates of fare on any such street railroad should not be a legislative power to be exercised independent of the company, but should be a contractual power which should be exercised in connection with the company, and consequently a power, the exercise

of which was limited and controlled by the mode of exercise pointed out by the statute. (3) That the provisions of the street railway law upon this subject, so far as they confer powers, rights, protection, and privileges upon companies organized thereunder, should apply to all companies that had theretofore been organized for street railroad purposes under the tram railway act. (4) That thereafter no companies should be formed for street railway purposes under the tram railway act, but that all street railroad companies thereafter formed must be organized under the street railway act. Thus showing a clear intention upon the part of the legislature to make uniform the laws applicable to the street railway business, whether the companies carrying on the business were formed under the tram railway act or under the street railway act. This aids us in reaching the conclusion that out of abundant caution the legislature adopted the proviso of 1867, by which the grants theretofore made to the companies organized under the tram railway act should be as free from municipal interference and the rights granted thereby should be as fixed and vested as were those which companies might obtain under the terms of the street railway act proper.

That the power of the city under the Michigan statute, and statutes of like legal import, is a power to grant an easement.

Detroit Citizens' St. R'y Co. *vs.* Detroit, 124 Mich., 453.
Detroit Citizens' St. R'y Co. *vs.* Detroit, 54 Fed. R., 628.
Knoxville *vs.* Africa, 77 Fed. R., 501.

A case directly in point is—
Knoxville *vs.* Africa, 77 Fed. R., 501,

decided by the circuit court of appeals for the sixth circuit. The court had under consideration a street railroad statute precisely like the Michigan one, so far as the power of the city was concerned, namely, that the consent of the city to occupy the street should be obtained. On page 507 the court says: "A right of way upon a public street, whether granted by act of the legislature or ordinance of city council, or in any other valid mode, is an easement, and as such is a property right, capable of assignment, sale and mortgage, and entitled to all the constitutional protec-

tion afforded other property rights and contracts." On page 508 the court says:

> "What is the extent of the power intrusted to the city government? The answer is plain; it is to consent to the occupation of the streets of the city between the termini named in the charter and within the general route designated therein as shall be deemed in the interest of the public. The consent when given by ordinance duly passed, constitutes a grant of a right of way on and over streets named and described in the ordinance, and constitutes a contractual ordinance conferring an easement which is irrevocable. By such an ordinance an incorporeal hereditament is created and vested in the grantee. Until 'consent' has been given by ordinance, prescribing the terms upon which the streets desired may be occupied, no street right exists in the railroad corporation. It is a corporation endowed with the substantial corporate franchise essential to the operation of a street railroad, but it is unable to exercise this franchise because it has no right to enter upon the streets and there construct the necessary tracks and appliances needful to the maintenance and operation of a street railroad. The power to 'consent' and the power to prescribe the 'terms' upon which it will consent implies the power to refuse to consent, or to consent only upon terms and conditions deemed wise, including the right to impose such limitation upon the duration of the grant as shall seem proper to the legislative discretion. City of Detroit *vs.* Detroit Citizens' Street Railway Co., 26 U. S. App., pages 570–599; 12 C. C. A., 365, and 64 Fed., 628; Louisville Trust & Banking Co. *vs.* City of Cincinnati (decided at present term), 76 Fed., 296. The delegated power to be exercised by the city government is not an unlimited one. It is the power to consent to the occupation of the public streets by a street railroad having a definite beginning and ending, and whose general route is designated in its charter. Within those limits it may exercise discretion. Beyond those limits its power does not extend."

II.

The provisions of the general street railway act of 1867 assist us in more than one way to a rightful conclusion as to the intention of the legislature with reference to the power of the municipality on the question of the rates of fare on street railways.

(*a.*) The street railway provisions of the train railway act and the general street railway law are *in pari materia*. The second proviso of section 34 of the train act and the general street railway law were enacted at the same session, and were parts of the same scheme of legislation, having for its object the regulation of the business of carrying passengers for hire on street railways in cities and villages.

(*b.*) By express provision the powers, rights, protection, and privileges conferred by the street railway act on companies organized thereunder are extended to street railway companies organized and existing under any law then in force.

1. That the two pieces of legislation are *in pari materia*, and that it was clearly the intent of the legislature to make uniform regulations for the conduct of the street railway business, we readily see when the provisions of the two acts of that year are read in the light of the journal history of their enactment. The most casual examination of the street railway provisions of the train railway act, as they stood prior to 1867, discloses that they were insufficient and meager for the purpose designed, and it must be evident that the legislature, when it undertook to deal in a more comprehensive manner with the street railway subject, were of opinion that more comprehensive provisions and more clearly defined limitations on the powers and rights of the cities and companies must be established. We claim that this was the purpose of the legislature in 1867, and that in the legislation of that year it was undertaken intelligently and permanently to provide for the regulation of the street railway business, which was then becoming important. The cities of the country were then growing rapidly, and street railways were becoming more and more an important convenience in urban transportation.

An examination of the legislative journal for 1867 shows that a bill was introduced in the senate of that body to

amend section 34 of the train railway act and to add several sections to the act. It was duly referred to a committee, which, at a subsequent date, reported it back with the present street railway act as a substitute therefor, and in the usual course of legislative business the substitute was passed by the senate as it stood, until recently amended. A bill had been introduced in the house of representatives of that year having the very general title of "A bill to further amend an act to provide for the construction of train railways," which in the course of business in that house was passed before the street railway act which had passed the senate reached the house. As enacted by the house, the bill contained no amendment whatever of section 34 and made no reference thereto. The senate, apparently adhering to its idea of limiting the power of the municipalities to interfere with existing or accepted grants after the same had been accepted, amended the house bill by inserting another section therein, which consisted of a re-enactment of section 34, as it then stood, and adding the second proviso as an amendment thereof. It will be remembered that the second proviso is the one which we have argued effectually withdrew from the municipalities any power which they might have had under the section as it theretofore stood to interfere with or to alter the terms of an existing and accepted grant. As thus amended, the house bill was returned to the house, the amendment agreed to, and the bill in that form became a law.

It is very evident from these facts that the legislature clearly intended that all street railways in Michigan should be subject to the provisions of the general street railway law, and even though we had not in the street railway act the expressly declared intention of the legislature that such was its purpose, there is sufficient in the history of the legislation to justify the claim that such was the intention. The fact that the bill first introduced, which contained what was apparently a comprehensive scheme of amendment to the street railway provisions of the train railway act, was abandoned for a more comprehensive and appropriate method of regulating the business by the framing of a new bill upon the same subject-matter which was put forward expressly as a substitute therefor, taken in connection with an examination of the various provisions of the substitute, clearly indicates an intention on the part of the legislature to

include within the scope of the legislation finally adopted all existing street railway grants, and to limit the power of the municipalities over them.

It is not necessary for us to cite extensively from the decisions in support of the proposition that where two acts are *in pari materia*, or where it can be gathered from the provisions of the two acts that it is the intention of the legislature that both shall apply to the subject-matter, it then becomes simply the duty of the court to examine the provisions of both acts, learn what the legislative intent was, and declare whether or not such intent has been effectually carried out. It will be noted that when the legislation of 1867 was enacted the old grants or easements from the city were in force by virtue of the original grants, and there was no provision in the train railway act, as it stood prior to 1867, nor in any of the grants from the city under that act, requiring a written acceptance thereof by the grantee. When the grants were extended in 1879, in 1880, and in 1885, at which time the street railway act of 1867 was in force, it will be noted that in each instance the ordinance followed the literal requirements of that act, and required the filing of a written acceptance of the grant by the grantees. It will also further be noted that in all ordinances thereafter adopted making grants of additional routes and easements on additional streets this provision of the street railway acts is strictly adhered to. A striking and notable example of this is found in the grant to the Detroit city railway in 1889 of a number of new routes. The city attached as a condition to the new easement that the company should, during certain hours in the day, carry people at a very much reduced rate of fare, and should extend the transfer privilege over a large number of its existing routes, as well as the new routes granted, and the further condition that the grant should be void unless the company should, within a certain period of time, file a written acceptance in which it would agree to the reduced rate of fare and the extended transfer privileges. It will also be noted that the requirement of an acceptance by the grantee of the terms of a grant or easement under the tram railway act is first introduced into that act by the amendment of 1867 to section 34. This goes to show that the legislature attached considerable importance to the requirement of an acceptance of the grant by the company with the evident purpose of placing the relations between the city

and the grantees upon a contractual basis, and effectually taking away from the municipality any right or authority independently of the company to alter or lessen the rights of the grantees under the grants. It is strong evidence of an intention upon the part of the legislative body to place the rights of companies under the tram railway acts and companies under the street railway acts upon the same secure and fixed basis of inviolability.

2. Since writing the foregoing we have received an additional brief from counsel for the appellant devoted largely to a discussion of the question of the legislative intent in the enactment of the street railway law to bring all existing companies and roads within the protection of the provisions of that act. In his brief it is in substance conceded that section 29 of the street railway act expressly declares the intention of the legislature that all street railway companies organized under the tram railway act shall be entitled to the rights, powers, protection, and privileges of the street railway act, but the claim is made that this intention was not effectuated for the reason that section 29 was not a valid enactment under the constitution of Michigan, in that it was in violation of section 20 of article 4 of the constitution of Michigan that "No law shall embrace more than one object which shall be expressed in its title."

On pages 8 and 9 the position of counsel is stated as follows: "The title of the street railway act, 'An act to provide for the formation of street railway companies' under the above rules, is no doubt sufficient to authorize the organization of street railway companies thereunder, and to define the rights, powers, privileges, duties, and liabilities of such companies; but such title is not broad enough to warrant the sweeping into such act of corporations not formed or organized thereunder, but which are governed and controlled by different provisions of law." A number of decisions of the Michigan supreme court are cited in support of this proposition, but it is respectfully submitted that not one of them supports the contention of counsel or has reference to any legislation like that which we have under consideration.

We understand the exact point of counsel to be that provision 29 of the street railway act, which in terms says that all existing street railway companies shall be subject to the provisions of that act, is not within the title of the street rail-

way act. That title is as follows: "An act to provide for the formation of street railway companies." It is presumed that counsel will not dispute the proposition and, in fact, we understand is willing to concede that fairly included within the purposes named, to wit, "the formation of street railway companies," would be all such provisions as have reference to the corporate powers, rights, privileges, and franchises of street railway companies, but he limits the scope of the language to the granting of those powers, rights, privileges, and franchises to street railway companies who receive their corporate existence subsequent to the enactment, and subject to the provisions of this particular act.

We submit that it is quite clear that such a narrow view of the title of this act is not justified by the well-settled rule as to the meaning of this constitutional provision. The rule, as we understand it to be, is stated by Mr. Justice Cooley, in his work on Constitutional Limitations: "There has been a general disposition to construe the provision liberally, rather than to embarrass legislation by a construction whose strictness is unnecessary to the accomplishment of the beneficial purposes for which it has been adopted. The general rule is that there is no objection to it so long as it is not made to cover legislation incongruous in its character or which by no fair intendment can be considered as having a necessary or *proper* connection" (pages 172–174).

This statement of the law by Judge Cooley is substantially quoted from a decision rendered by him in People *vs.* State Insurance Co., 19 Mich., 392, where an act to provide for the incorporation of insurance companies contained a provision that all existing companies, foreign or domestic, should be subject to certain supervisory and visitorial powers and which was attacked upon the ground that it was not fairly within the title of an act entitled providing for the organization of insurance companies.

What is meant by a formation of street railway companies? Unquestionably it must not be limited to such provisions as simply refer to the steps to be taken to form the company, but must be said on the strictest construction to include within its scope and meaning all those statutory regulations and provisions by which the powers, privileges, and immunities of the corporations so formed are declared and protected. And in common understanding the provisions of an act declaring what the powers

and regulations, privileges, and franchises of a corporation shall be are as essential, in the ultimate and complete formation of the corporation, as are the provisions of the statute which authorize and point out the manner of obtaining the franchise of being a corporation. In other words, the formation of a corporation is not, according to the ordinary understanding, the mere filing of articles of agreement, but the formation of the corporation is made up of the articles of agreement and the provisions of the law creating and defining the powers, functions, rights, privileges, and franchises of the corporations so created; and so we say that when the act in terms expressly says that the powers, rights, protections, and privileges conferred upon companies formed under the street railway act shall become the charter powers, rights, protections, and privileges of existing street railway companies, it is completing the formation of the existing street railway companies by so doing. This is well illustrated by well-known legislative practice, by which general laws providing for the formation or incorporation of companies are from time to time amended.

Would it not require a good deal of hardihood to say that such amendments do not pertain to the formation of the corporation? If the provisions in question undertook to confer the powers, rights, protection, and privileges of the street railway act upon corporations other than street railway corporations, there might be some force to the objection, because such legislation would be incongruous and not germane; but when we consider that the last amendment to an act of incorporation pertains to the functions, powers, rights, and privileges of a corporation as much as the original provisions of the act did, we are forced to the conclusion that the legislature, in the enactment of section 29, was in fact attempting to complete, upon a general plan, the formation of existing street railway companies so that all companies engaged in that business should have the same powers, rights, protection, and privileges.

The formation of a corporation may be, and most likely is, the result of many and repeated legislative steps by which from time to time its charter and its functions, powers, rights, and privileges have been added to or decreased, curtailed, modified, or abolished; yet the last legislative step or act would be just as "formative" as the very first enactment.

Now, bearing this in mind, how can it be claimed that in

"An act to provide for the *formation* of street railway companies" the legislature cannot enact general provisions for the purpose of bringing existing corporations, already formed for the same purpose, within its regulations. Those provisions are steps *in the formation* of those existing companies as the legislature desired they should thereafter exist.

To illustrate: Suppose, in drafting the street railway act, the legislature had, as the first section thereof, said:

> "All street railway companies in this State, whether heretofore or hereafter organized, shall be subject to the provisions of this act, and shall have all the powers, rights, protection and privileges hereby declared,"

and followed it with the act as we find it, could it be claimed that the act was not one for the formation of charters of existing companies as the legislature desired they should stand from that time forward? We submit not. We are not here discussing or considering what the effect of such legislation would be in repeal or alteration of the former charters.

One of the weaknesses in the position of appellant's counsel is in assuming that all the provisions of an act to provide for the formation of a class of corporations must be confined to those created by that act, and cannot be extended to others of the same class, organized for precisely the same purposes under an earlier act.

Such has not been the view of the bench or bar in Michigan.

We have a notable example of this very method of legislation in the statute of Michigan providing for the incorporation of railroads.

In 1871 the legislature passed an act to revise the laws providing for the incorporation of railroad companies, and to regulate the running and management, and fixing the duties and liabilities of railroad and other corporations owning or operating any railroad within the State. Nothing was said in the title about the repeal of existing acts of incorporation, or the re-incorporation of existing companies thereunder, or the extension of the provisions of the act to existing corporations. The law made sweeping radical changes in the provisions for the regulation and operation

of railroads, and also in the method of incorporation, and the powers, rights, privileges, and liabilities of railroad companies under their charter; nevertheless, section 13 of the new act repealed in express language all of the prior acts for the formation of railroad companies, and enacted the following provision:

> "The organization of all corporations under the provisions of either of said (repealed) acts shall be deemed and taken to be organizations under this act, and all rights, obligations and liabilities contracted or incurred by any such corporations thereunder, or under the provisions of any law now in force, not inconsistent with the provisions of this act shall continue with the same force and effect as though such acts or law had not been repealed, and all such companies from and after the taking effect of this act shall be subject to all of the provisions herein as fully as though such organization had been perfected hereunder."

It is a matter of common knowledge that many of the most important railroad companies in Michigan, and now operating lines therein, were incorporated under the repealed acts, and are exercising their functions as corporations by virtue of the clause last above quoted and according to the provisions of the act of 1871. If the provision in the street railway act is invalid, then this railroad provision is more clearly so. It will be noted there is no requirement that the existing companies shall voluntarily reincorporate, but by express language all existing corporations are swept within the provisions of the new act and the new charter thrust upon them, so to speak, by direct legislation.

Substantially the same provision is found in the laws with reference to manufacturing corporations in Michigan.

We will examine some of the decisions cited by appellant's counsel as sustaining his contention that section 29 is invalid.

Isle Royale Corporation *vs.* Osmun, 76 Mich., 162, is cited, but, as we understand this decision, it sustains the validity of the legislation attacked.

In that case the supreme court had under consideration the provisions of an act entitled

> "An act to revise the laws providing for the incorporation of companies for mining, smelting and manufacturing iron, copper, silver, mineral, coal and other ores and minerals, and to fix the duties and liabilities of such corporations."

The act contained the following section:

> "Foreign corporations organized for the purposes authorized by this act, upon filing copies of their charter or articles of incorporation as provided in section 5, may carry on business in this State, and shall enjoy all the rights and privileges and be subject to all the restrictions and liabilities of corporations existing under this act."

The company, an English corporation, sought to avail itself of the benefit of this provision, but the Secretary of State refused to accept and file the copy of the charter and the articles of incorporation. It appeared from the charter and articles of incorporation of the English corporation that mining was but one of the purposes for which it was incorporated, and apparently an insignificant feature of the organization. Among other things, it was a land corporation, and its purposes included every incident of a proprietary, colonial occupation, including expressly the development of mineral, agricultural, grazing, and other resources: stock-breeding, farming, buying and selling live and dead stock, making all manner of urban and rural ways and improvements on land and water, with power within itself to organize other corporations for the purposes named, for investing in stocks and foreign, State, and Government securities, and dealing in negotiable paper; with power to buy up other enterprises, and to enter into joint arrangements, and many other matters. On the refusal of the Secretary of State to file the articles under the section quoted, it was sought by mandamus to compel him to file them. The mandamus was denied, two of the judges holding that *if* it was intended by the section quoted to confer powers *upon* FOREIGN *corporations as such*, it was not within the title or general purposes of the statute or of the constitutional provision; and also that section 23 was not designed to reach cases where the powers and purposes of the foreign corporation were differ-

ent from bodies incorporated under the statute itself. There is no intimation in the opinion of the two judges that as to a domestic corporation formed for the same purpose such provision would be invalid. Their opinion proceeds wholly upon the theory that such legislation inserted in the act as would have for its purpose the admission of a *foreign* corporation of a different character and for different purposes into the State, and giving to such foreign corporation the benefit of the provisions of the act, would not be within the scope of the title, but that the English corporation which had applied for admission was not within the purview of the provision, as it was not a corporation organized for the same purposes as those authorized by the act. Two of the judges concurred in all of the views presented in the opinion quoted from. Two of the judges dissented wholly from the view of Justice Campbell holding that under the provision in question the English corporation was entitled to be admitted, and that even under the broad construction attempted to be given the section it was valid. The fifth judge wrote a short opinion, in which he treats the provision as valid, but concurs in denying the application for the mandamus upon the ground that the English company did not come within the provisions of the section, stating:

> "The question presented in this application is whether we will compel the Secretary of State to file and record the articles of incorporation of relator. This we ought not to do, unless we are satisfied that under the existing laws relator is entitled to have them filed and recorded.
>
> "The statute contemplates that foreign corporations may file and record their articles of incorporation, and thereby be permitted to carry on the business for which they are incorporated; but the statute does not contemplate that foreign corporations may be empowered to carry on business not authorized by the laws of this State to domestic corporations, and for this reason I concur in denying the application."

It will thus be seen, first, that the opinion of Mr. Justice Campbell, concurred in by Justice Sherwood, does not hold the provision invalid, as not one within the scope of the title, unless it was intended to confer powers of a wholly

different character upon foreign corporations, but concludes by denying the application in the following language:

> "But this company, as a corporation, is organized under foreign laws for the multifarious purposes named in its articles, and cannot obtain any legal standing by filing its papers under section 23 of the mining law for the formation of corporations in this State without a subversion of settled principles."

In none of the opinions is it intimated that a provision similar to the one quoted, and referring to Michigan corporations already formed for the same identical purposes as those to be formed under the act, would be invalid. On the contrary, the result of Judge Campbell's opinion is simply that if the provision was intended to apply to corporations such as the English one it was not within the purview of the title, or if it was designed to create a distinct class of corporations for different purposes, it was not within the title. The opinions of the majority of the court are distinctly in favor of its validity, one of the judges limiting its application, however, to corporations carrying on a business like those authorized by the act, two of the judges holding that it was valid and applicable to the English corporation. This decision, instead of supporting the contention of appellant's counsel, distinctly supports our view.

The case of Mok *vs.* The Detroit Building & Savings Association, 30 Mich., presents a different question from the one here. There it was sought to organize corporations for building and leasing houses and tenements under the provisions of an act to authorize the formation of corporations for mining and smelting purposes. The gist of the decision in that case was simply that you could not, by reference to a general law for the formation of corporations of one class, provide for the formation thereunder of corporations of a wholly different class and for wholly different purposes, upon the ground that the new class of corporations did not come within the title of the act to which they must look for a statement of their coporate powers.

Skinner *vs.* Wilhelm, 63 Mich., 568, relates to the validity of an act of the legislature which had two distinct and separate objects in its title, one of which was to provide for the incorporation of Merchants' Mutual Insurance Com-

panies; the other of regulating the business of insurance by Merchants' and Manufacturers' Mutual Insurance Companies, and applied as well to merchants and manufacturers mutual insurance companies of a domestic character as to those of a foreign character.

We submit that the true rule on this subject is stated in the City of St. Paul *vs.* Lamprecht, 88 Fed. Rep., 449, decided by the court of appeals, and reported in the 31st C. C. A. Speaking of this constitutional provision, that court says:

> "It was not adopted to prevent the legislature from inserting in an act any provision which is germane to the general subject to which the act relates, but to prevent surreptitious legislation and the union in the same act of incongruous matters which have no relation to each other or to the general subject with which an act deals. (Citing cases.) This provision of the constitution ought not to receive a narrow or technical construction which will embarrass legislation by making laws unnecessarily restricted in their scope and operation, but like all provisions of the law, it should be fairly and liberally interpreted and enforced so that it will serve to prevent the abuses at which it was aimed without placing unnecessary restraints upon legislative action."

The rule is stated by the same court in Tabor *vs.* Commercial Bank, 63 Fed. Rep., 387, as follows:

> "Were the subject of the law as clearly stated in the title, the law will not be held obnoxious to this clause of the constitution on account of the presence in it of any provisions that are germane to the subject expressed in the title, or that would be naturally suggested by it as necessary or proper to a complete accomplishment of the purpose disclosed."

It should also be stated that this is the first time that any question has been raised as to the validity of this section, though it was directly applied in a former case between the parties in this case.

Citizens' St. R'y Co. *et al.* *vs.* City of Detroit, *supra*.

The court of appeals quoted the section as showing that the street railway act did apply to train railways and to city grants of easements to train railway companies made after 1867.

It is submitted that the decree of the lower court should be affirmed.

M. Brennan and
John C. Donnelly,
Counsel for Appellee.

Office Supreme Court, U.S.
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Supreme Court of the United States.

OCTOBER TERM, 1901.

No. 152.

THE CITY OF DETROIT, WILLIAM C. MAYBURY, MAYOR, AND CHARLES FLOWERS, CORPORATION COUNSEL, APPELLANTS,

vs.

THE DETROIT CITIZENS' STREET RAILWAY COMPANY.

PROCEEDINGS IN PASSAGE OF STREET RAILWAY COMPANY ACT.

Bill to amend section 34 of an act entitled "An act to amend an act to provide for the construction of train railways, &c."

Introduced, read a first and second time, and referred to Committee on Incorporations (Mich. Sen. Jour., 1867, vol. 1, pp. 106, 107).

Reported back by committee, with substitute therefor of "A bill to provide for the formation of street railway companies," and recommended that substitute do pass. Report accepted, committee discharged, and senate concurred in

adoption of substitute reported by committee. Bill placed on general order (Mich. Sen. Jour. 1867, vol. 1, p. 217).

Bill amended and placed on third reading (Mich. Sen. Jour. 1867, vol. 1, p. 556).

Passed (Mich. Sen. Jour. 1867, vol. 1, p. 574).

Returned from the house (Mich. Sen. Jour. 1867, vol. 1, p. 867).

Reported enrolled (Mich. Sen. Jour. 1867, vol. 1, p. 947).

Notice of approval (Mich. Sen. Jour. 1867, vol. 1, p. 976).

Proceedings in Passage of Amendment to Section 34, Train Railway Act.

Introduced and referred (Mich. House Jour. 1867, vol. 1, p. 184).

Reported and referred to committee of the whole (Mich. House Jour. 1867, vol. 1, p. 346).

Reported and ordered to third reading (Mich. House Jour. 1867, vol. 1, pp. 671, 672).

Passed (Mich. House Jour. 1867, vol. 1, p. 758).

Returned from senate, amended as finally passed (Mich. House Jour. 1867, vol. 3, p. 2475).

Reported enrolled (Mich. House Jour. 1867, vol. 3, p. 2546).

Notice of approval (Mich. House Jour. 1867, vol. 3, p. 2565).

No. 152.

Brf. of Duffield, Brennan & Donnelly for Appellees.

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Supreme Court of the United States

THE CITY OF DETROIT, *et al.*
Appellants,
vs.
THE DETROIT CITIZENS' STREET RAILWAY COMPANY.

October Term, 1901.
No. 152.

Filed Nov. 13, 1901.

BRIEF FOR APPELLEES ON QUESTION OF EQUITABLE JURISDICTION.

HENRY M. DUFFIELD,
Counsel for Appellees.

MICHAEL BRENNAN,
JOHN C. DONNELLY,
Of Counsel.

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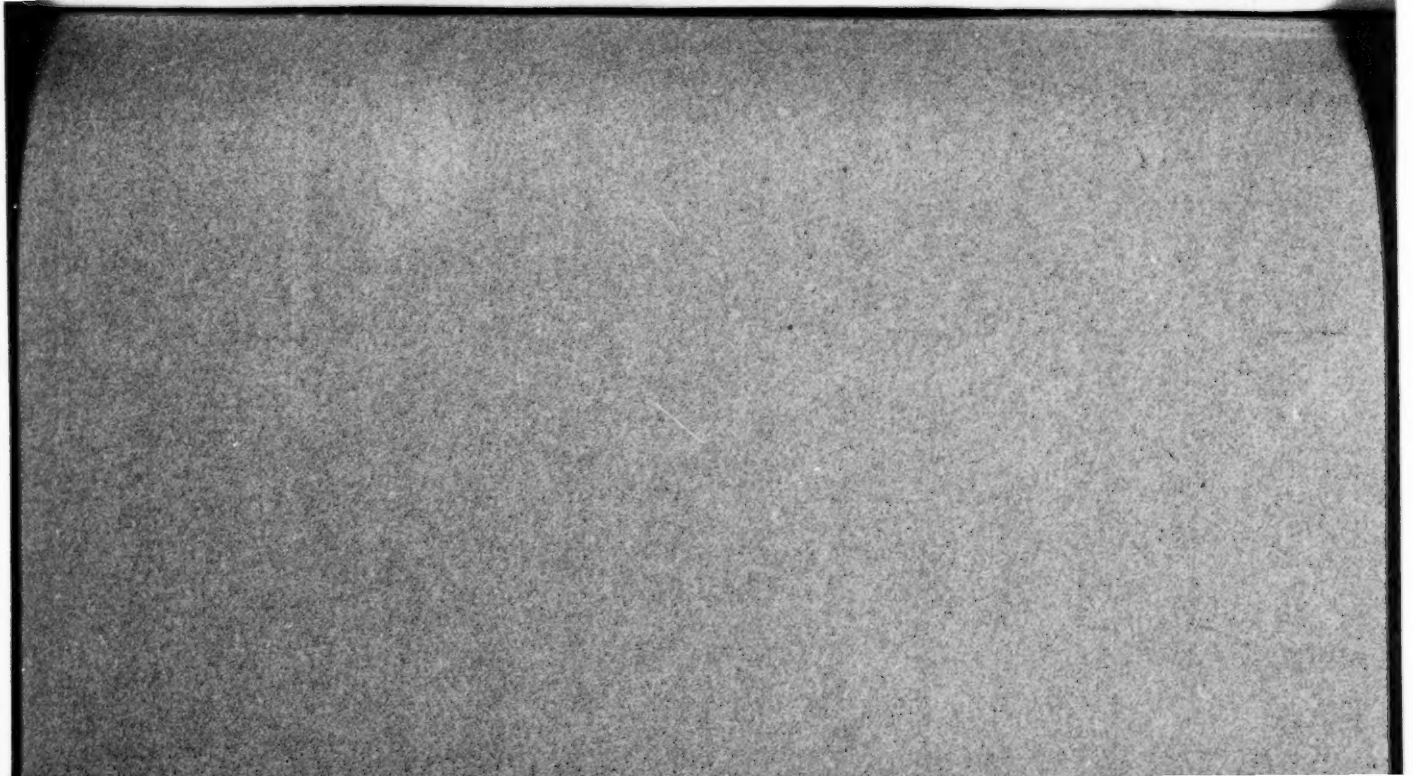

Supreme Court of the United States

THE CITY OF DETROIT, *et al.*
Appellants,
vs.
THE DETROIT CITIZENS' STREET RAILWAY COMPANY.

October Term, 1901.
No. 152.

BRIEF FOR APPELLEES ON QUESTION OF EQUITABLE JURISDICTION.

The theory of complainant's bill is: that it has a contract with the City of Detroit to charge five cents for a single fare on any of its routes; that the ordinances prescribing the sale of eight tickets for twenty-five cents, abrogate and impair this contract and are therefore invalid and void.

The bill alleges:

"Your orator further shows unto the Court that as owner and lessee it is now engaged in the operation of upwards of one hundred and thirty-five miles of street railways in the streets of the City of Detroit; that in such operation it has in use upwards of four hundred street cars, which are propelled by electricity, and has in its employ, engaged in such operation, upwards of one thousand men as motormen and conductors; that it carries an average of ..... thousand passengers per day over the lines owned and operated by it; that under and by virtue of the provisions of said ordinances, Exhibits 'A,' 'B,' 'C,' 'D' and 'E,' and the obligation of your orator to carry such passengers as may offer themselves for carriage, it will be subjected to innumerable demands upon the part of the traveling public to sell to such persons as may make such demands tickets in accordance with the provisions of said ordinances, Exhibits 'A,' 'B,' 'C,' 'D' and

'E," and to issue, as provided and required thereby, and to accept and carry such passengers and transfer the same at the rates of fare fixed by said ordinances; that on your orator's refusal to comply with such demands and requests your orator may be subjected to numerous actions at law by persons so refused, and to annoyance, litigation and loss by reason thereof. That the said City of Detroit will seek, and now seeks, and threatens and intends by such power and authority as it may possess, and by vexatious legal proceedings, to compel your orator to comply with the provisions of said ordinances, Exhibits 'A,' 'B,' 'C,' 'D' and 'E,' and as a result your orator will be put to great loss, damage, hindrance and annoyance in transaction of its business, which it is entitled to carry on without such suits, litigation, actions, annoyance, hindrance, loss and damage."

Record, p. 14.

The allegations in this paragraph are admitted by the answer. (Record, p. 112.)

In paragraph twenty the bill alleges that large amounts of its bonds fall due within the next three years (after 1899), to retire which it will be necessary for complainant to borrow on bonds of like character large sums of money secured by mortgage on complainant's property and franchises and easements.

Record, p. 15.

The bill is a Bill of Peace and the allegations above stated make a case of equitable jurisdiction.

In Western Union Telegraph Company vs. Norman Auditor, 77 Fed., 13, 21, a bill to restrain the State Auditor of Kentucky from certifying to sixty-eight county clerks their respective proportions of the taxes which the bill prayed to have declared void, was sustained on the ground of the multiplicity of suits which would follow such certification.

None of the county clerks were made defendants.

In Smith vs. Bivens, 56 Fed., 352-356:

A bill to have declared void an act of the Legislature of South Carolina exempting courts' property from the provisions of the general law requiring all owners of stock and cattle to keep them fenced in, was sustained on the ground that by the operation of the act the court was

exposed constantly to trespasses upon the land and "were he limited to relief at law he would be involved constantly in a multiplicity of suits and harassed by endless and unsatisfactory litigation."

So in the case at bar the Street Railway Company will be exposed to numberless attempts of persons to ride on their cars on tendering twenty-five cents for eight tickets and claims of extra transfers—which would be in the nature of trespasses in which no adequate remedy at law exists, many of which would result in strife upon the cars and suits against the company for damages. It is apparent that such attempts would seriously affect the operation of the street railway not only in respect to such trespassers, but in the altercation and strife between them and conductors would affect its business with alien and unlawful passengers. A dispute between the Street Railway and its employes in the City of Detroit evoked a serious and dangerous riot which stopped the moving of all cars in the city. This constitutes an irreparable injury within the decisions.

In Parker vs. Woolen Co., 2 Black, 551:

"It (equity) will also give its aid to prevent oppression and interminable litigation or a multitude of suits or where the injury is of such a nature that it cannot be adequately compensated by damages at law, or is such as from its continuance or permament nature must occasion a constantly recurring grievance which cannot be prevented otherwise than by an injunction" (citing cases). It is said

In Wahle vs. Reinbach, 76 Ills., 322, "irreparable injury" is not such as is beyond the possibility of repair or beyond possible compensation in damages, nor necessarily great injury or great damage, but that species of injury, whether great or small, that ought not to be submitted to on the one hand or inflicted on the other and because it is so large on the one hand or so small on the other is of such constant and frequent recurrence that no fair and reasonable redress can be had therefor in a court of law."

In Nashville C. & St. L. Ry. Co. vs. McConnell, 82 Fed., 65:

A bill was sustained to prevent the use of Nashville exposition tickets by persons other than the original purchasers. The defendants were ticket brokers or "scalpers" who had no contract relations whatever with the railroad company. The court held that one who wrongfully interferes in a contract between others is liable to

the party injured thereby and his continued interference may be ground for injunction—and said:

It is not necessary, after having stated the facts at length, to say that it is perfectly apparent that practically these complainants are without any adequate redress for violation of these ticket contracts, and that for damages which they may sustain, if there is no remedy in equity, there is none whatever, in any just sense. Indeed, I do not understand the eminent counsel for the defendants to contend that the multitude of suits at law, in any form in which they might be technically maintained, would bring any substantial result to the complainants. On the contrary, it is perfectly apparent that it would only involve the companies in further loss, in the outlay necessary to meet large bills of cost against insolvent persons, to say nothing of other difficulties which are obvious enough (p. 69).

The case simply calls for an application of the injunctive process to prevent complainant's business from fraud and obstruction, and a business is just as much the subject of suit, with a right to protection, as ordinary forms of tangible real and personal property. Whatever doubt may have been expressed at any time, the cases are now agreed upon this proposition. It needs no extended statement to make it manifest that the right to carry on a business without interference, without fraud, and without obstruction, is one of the most valuable of all rights. Indeed, in the commercial world the right of greatest value is the right to freely carry on a lawful business without unlawful interruption. It is a substantial right, which may be protected by any remedy known to the court as fully as a constitutional or statutory right, and as fully as a right in the ordinary forms of property. In Scott vs. Donald, 165 U. S., 108, 17 Sup. Ct., 262, already referred to, it was held by the Supreme Court of the United States that the constitutional right of the complainant to import for his use, from time to time, ale, wines, and liquors, the products of other states, might be protected by injunction from repeated invasion by seizure of goods under color of an unconstitutional statute of the State of South Carolina. The ruling was based on the ground of avoiding a multiplicity of suits, and the want of adequate remedy at law.

In Dinsmore vs. Southern Express Co., 92 Fed., 764:

A bill, by its stockholders, was sustained against the Express Co., the Railroad Commission of Georgia and its

members and the Attorney General of the State to enjoin the express company from paying the war stamp tax receipts and the Railroad Commission and Attorney General from enforcing the penalties of the state statute against the express company for such failure to pay.

This case would be directly in point if the Street Railway Company had refused to file the bill and the stockholders had filed the bill and prayed that the company be enjoined from selling tickets and giving transfers under the ordinances and the city, its mayor and counsel be enjoined from enforcing the ordinances, for the jurisdiction of the court was not put upon the sole ground of compelling the directors of the company to execute their trust and protect the stockholders from injury.

The case at bar is in many, and, we think, in all material respects, within the decision of this court in

Smyth vs. Ames, 169 U. S., 466, 517,

which was a bill filed to enjoin the enforcement of rates prescribed by a commission—and it was held within the equitable jurisdiction of the court. While in that case penalties were imposed, the decision was not put solely on that ground. The Court say (pp. 517, 518):

"The transactions along the line of any one of these railroads, out of which causes of action might arise under the statute, are so numerous and varied that the interference of equity could well be justified upon the ground that a general decree, according to the prayer of the bills, would avoid multiplicity of suits, and give a remedy more certain and efficacious than could be given in any proceeding instituted against the company in a court of law; for a court of law could only deal with each separate transaction involving the rates to be charged for transportation. The transactions for a single week would expose any company questioning the validity of the statute to a vast number of suits by shippers, to say nothing of the heavy penalties named in the statute. Only a court of equity is competent to meet such an emergency and determine, once for all and without a multiplicity of suits, matters that effect not simply individuals, but the interests of the entire community as involved in the use of a public highway and in the administration of the affairs of the quasi-public corporation by which such highway is maintained."

It will be observed that in neither of these two last cases were any of the persons who were to use the tickets

or to get the benefit of the reduced rates of transportation parties to the suit. The decisions proceed on the ground that the *company's business* is affected injuriously and the right to sue at law for each specific injury is not sufficiently comphehensive and is not adequate.

II.

The court is not compelled to consider this question. It is waived by failure to raise it in the answer or on the proofs.

Reynes vs. Dumont, 22 C. C. A., 248.
Kilbourn vs. Sunderland, 130 U. S., 354; 130 U. S., 505.

Moreover, the defendant expressly waived in open court, and in the interest of the public and the peace and good order of the city both parties desire the main question settled.

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Counsel for Appellees.

MICHAEL BRENNAN,
JOHN C. DONNELLY,
Of Counsel.

Office Supreme Court
FILED
NOV 4 1901
JAMES H. McKENNEY,
Clerk.

Supreme Court of the United States.

OCTOBER TERM, 1901.

No. 152.

THE CITY OF DETROIT, WILLIAM C. MAYBURY, MAYOR, AND CHARLES FLOWERS, CORPORATION COUNSEL, APPELLANTS,

vs.

THE DETROIT CITIZENS' STREET RAILWAY COMPANY.

PROCEEDINGS IN PASSAGE OF STREET RAILWAY COMPANY ACT.

Bill to amend section 34 of an act entitled "An act to amend an act to provide for the construction of train railways, &c."

Introduced, read a first and second time, and referred to Committee on Incorporations (Mich. Sen. Jour., 1867, vol. 1, pp. 106, 107).

Reported back by committee, with substitute therefor of "A bill to provide for the formation of street railway companies," and recommended that substitute do pass. Report accepted, committee discharged, and senate concurred in

adoption of substitute reported by committee. Bill placed on general order (Mich. Sen. Jour. 1867, vol. 1, p. 217).

Bill amended and placed on third reading (Mich. Sen. Jour. 1867, vol. 1, p. 556).

Passed (Mich. Sen. Jour. 1867, vol. 1, p. 574).

Returned from the house (Mich. Sen. Jour. 1867, vol. 1, p. 867).

Reported enrolled (Mich. Sen. Jour. 1867, vol. 1, p. 947).

Notice of approval (Mich. Sen. Jour. 1867, vol. 1, p. 976).

Proceedings in Passage of Amendment to Section 34, Train Railway Act.

Introduced and referred (Mich. House Jour. 1867, vol. 1, p. 184).

Reported and referred to committee of the whole (Mich. House Jour. 1867, vol. 1, p. 346).

Reported and ordered to third reading (Mich. House Jour. 1867, vol. 1, pp. 671, 672).

Passed (Mich. House Jour. 1867, vol. 1, p. 758).

Returned from senate, amended as finally passed (Mich. House Jour. 1867, vol. 3, p. 2475).

Reported enrolled (Mich. House Jour. 1867, vol. 3, p. 2546).

Notice of approval (Mich. House Jour. 1867, vol. 3, p. 2565).